78-1229

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY),

Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

PHINEAS STEVENS
RHESA H. BARKSDALE
17th Floor, Deposit Guaranty Plaza
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Petitioner

Of Counsel:

BUTLER, SNOW, O'MARA, STEVENS & CANNADA
17th Floor, Deposit Guaranty Plaza
Post Office Box 22567
Jackson, Mississippi 39205

Dated: February, 1979

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

OTHER AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY),
Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

The petitioner, A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, entered July 17, 1978 and modified November 6, 1978, vacating and setting aside an order of the Interstate Commerce Commission (ICC).[1]

1. The United States of America and Interstate Commerce Commission were respondents in the Court of Appeals. The petitioner here, together with AAA Cooper Transportation, The Mason and Dixon Lines, Incorporated, Gordons Transports, Inc., and Reliable Truck Lines, Inc. were intervening respondents in the Court of Appeals. The proceeding below was brought to review an order of the ICC by the following parties, who are hereby designated as respondents in this petition: North Alabama Express, Inc., Baggett Transportation Company, Bee-Line Express, Inc., Bowman Transportation, Inc., Floyd & Beasley Transfer Company, Inc., Georgia-Florida-Alabama Transportation Company, and Hiller Truck Lines, Inc.

OPINIONS

The July 17, 1978 opinion of the Court of Appeals is reported in 576 F.2d 679, and the November 6, 1978 opinion is reported in 583 F.2d 779. These appear as Appendix A. The decision of the ICC, dated August 12, 1976, reviewed by the Court of Appeals, is reported in 122 M.C.C. 501. That decision affirmed with modifications the decision of an Administrative Law Judge served January 19, 1973. Interim orders of the ICC were dated November 26, 1973, May 21, 1974, June 28, 1974, and June 6, 1975. These ICC decisions and orders appear as Appendix B.

JURISDICTION

The judgment of the Court of Appeals, Fifth Circuit, was entered July 17, 1978. On November 6, 1978 a timely petition for rehearing and suggestion for rehearing *en banc* was overruled,[2] but the court on such date modified its July 17, 1978 opinion. This petition for certiorari was filed within 90 days of the last decision below. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. By its 1962 amendment to §206 of the Interstate Commerce Act [49 U.S.C. §306(a)(7)(A)],[3] did Congress intend to vest state regulatory commissions with the power

2. 585 F.2d 520 (Table).

3. Subsequent to the decision by the Court of Appeals, the Interstate Commerce Act was revised and codified as 49 U.S.C. §§10101 *et seq.* Since this case was decided prior to such recodification, all references herein will be to the Interstate Commerce Act that was then in effect.

to override decisions of the ICC approving motor carrier acquisitions of interstate operating authority pursuant to 49 U.S.C. §5(2), thereby repealing by implication the "exclusive and plenary" power and jurisdiction expressly conferred on the ICC by §5(12)?

2. In reviewing an ICC order granting motor carrier operating authority under §207 [49 U.S.C. §307], was it proper for the Court of Appeals to vacate and set aside the Administrative Law Judge's findings of public convenience and necessity (admittedly supported by substantial evidence) on the ground that the ICC's order affirming and adopting such findings was entered by a division of the Commission [three commissioners] which "lacked authority" to enter such order, in view of the provisions of 49 U.S.C. §17(4) and the Organizational Minutes of the ICC[4] which stated that each division of the Commission "shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions assigned or referred thereto . . . and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission"?

STATUTORY PROVISIONS INVOLVED

The following provisions of the Interstate Commerce Act are involved: §§5(2), 5(12), 17(1), 17(2), 17(3), 17(4), 206(a)(7)(A), and 207(a) [49 U.S.C. §§5(2), 5(12), 17(1), 17(2), 17(3), 17(4), 306(a)(7)(A), and 307(a)].[5] These appear as Appendix C.

4. 30 Fed. Reg 11189 *et seq.* (Aug. 31, 1965).

5. See note 3, *supra*. In conformity with the practice followed by the court and Commission below, all references hereafter to such section numbers will be to the Interstate Commerce Act (prior to its recodification) and not to the United States Code.

STATEMENT OF THE CASE

Respondents North Alabama Express, Inc., *et al.* instituted this proceeding in the Court of Appeals[6] to review a decision of the ICC which granted certificates of public convenience and necessity to four motor carriers (AAA Cooper Transportation, The Mason and Dixon Lines, Incorporated, Gordons Transports, Inc., and Reliable Truck Lines, Inc.). These certificates authorized such carriers to conduct interstate operations in Alabama as the successors to petitioner A-OK Motor Lines, a bankrupt motor common carrier.

A-OK had previously conducted operations in intrastate commerce pursuant to a certificate of public convenience and necessity issued by the Alabama Public Service Commission (APSC) and in interstate commerce pursuant to certificates of registration issued by the ICC under §206(a)(7)(A). The bankruptcy court ordered the sale of all assets of A-OK and approved the sale of its intrastate and interstate operating authority to the above-named carriers (Cooper, M&D, Gordons and Reliable) under contracts that were subject to approval by both the APSC and the ICC.

Section 206(a)(7)(A) provides that the transfer to another motor carrier of interstate operating authority represented by a certificate of registration is subject to the provisions of §5(2). The parties recognized, however, that the purchasers, being multistate carriers, were not eligible to have A-OK's interstate certificates of registration transfered or reissued to them, since, under §206(a)(7)(A), only single-state carriers are eligible to hold certificates

6. Jurisdiction of the Court of Appeals is found in 28 U.S.C. §§2321, 2342(5), and 2343.

of registration (as distinguished from certificates of public convenience and necessity). Accordingly, each purchaser filed two separate applications with the ICC. One was filed under §5(2) seeking approval of the acquisition of a portion of the interstate operating authority embraced within A-OK's certificate of registration (including A-OK's goodwill and going concern value), as successor to A-OK. The second application was filed under §207 seeking the issuance of a certificate of public convenience and necessity (PCN), replacing A-OK's certificate of registration, and authorizing such purchaser to conduct in its own right a portion of the interstate operations formerly conducted by A-OK. This dual-application procedure under §§5(2) and 207 was in accordance with the established procedure, long followed by the ICC, as noted by the court below (App. A, p. A10, citing The C & D Motor Delivery Co.—Purchase—Elliott, 38 M.C.C. 547, 553 (1942)). Also pursuant to such established procedures, the Federal Register notices describing these applications stated that the §207 PCN applications were "directly-related" to the §5(2) acquisition applications.

Applications were also filed with the APSC seeking acquisition of A-OK's intrastate operating authority.

The ICC promptly granted each vendee-applicant temporary authority to conduct its portion of the operations formerly conducted by A-OK, pending final disposition of its application for permanent authority. Such operations were instituted in early 1971 and have continued without interruption to date.[7]

All of the §5(2) and §207 ICC applications were assigned for hearing on a consolidated record before an Ad-

7. Although the Court of Appeals' judgment was not stayed, the ICC has withheld further proceedings pending final disposition of the court proceedings.

ministrative Law Judge. The above-named respondents participated in such hearing as protestants and have actively opposed these applications at all stages. At the hearing, extensive oral and documentary evidence was presented in support of both the §5(2) acquisition and the §207 PCN applications. To support their contention that PCN justified and required issuance of certificates under §207, the applicants presented testimony from 62 shipper witnesses and 5 connecting motor carriers, together with evidence of their own operations under temporary authority and of A-OK's past operations under its interstate authority.

In his report, the Administrative Law Judge made detailed findings of fact, including a summary of the evidence of public need for the services proposed to be conducted on a permanent basis by the applicants, concluding that the applicants "sustained their burden of proof with respect to the issuance of certificates of public convenience and necessity." Neither the accuracy of these findings nor the substantiality of such evidence has ever been challenged, and such findings were ultimately affirmed and adopted by Division 3 of the Commission, acting as an Appellate Division.

Since the contracts between the parties required approval by the APSC as well as the ICC, the ALJ conditioned his approval upon similar approval by the APSC in the applications before the state commission. It developed, however, that the APSC refused to approve the division of A-OK's intrastate authority among the four vendee-applicants, and that refusal was subsequently upheld by the Alabama Supreme Court.[8] Pending disposition of the state court litigation, the ICC held its final decision

8. *Alabama Public Service Commission, et al.* v. *Cooper Transfer Company, et al.*, 295 Ala. 209, 326 So.2d 283 (1975).

in abeyance, declining to permit the parties to consummate the interstate phase of the proceedings without regard to the outcome of the intrastate proceedings.[9] When the state court proceedings did become final, the applicants then amended their contracts, with approval of the bankruptcy court, and agreed to abandon and request cancellation of A-OK's intrastate authority.

Based upon these amended contracts, the parties then requested leave to amend their pending applications before the ICC by eliminating therefrom the requirement for APSC approval.[10] After granting such amendments, the ICC reaffirmed and readopted the ALJ's findings of PCN and approved both the §5(2) and the §207 applications, subject to specified conditions. Such order provided that §207 PCN certificates would be issued to the applicants upon the furnishing of evidence that A-OK had filed with the APSC a *request* for cancellation of all of its intrastate rights. Such order further provided that, in the event the APSC denied such request, "neither vendor nor anyone affiliated with vendor, or successor-in-interest to vendor, may use the retained intrastate authority, if not cancelled, in support of any interstate operations."[11]

In reaching its decision on the amended applications, the ICC considered in detail the provision of §206(a)(7)

9. The Commission ruled that, since the contracts between the parties required approval of the transfer of both the interstate and the intrastate rights, a transfer of the interstate rights prior to the proposed transfer of the intrastate rights would be contrary to §206(a)(7)(A) which prohibited transfer of an interstate certificate of registration "apart from the transfer of the corresponding intrastate certificate."

10. The intrastate authority was deemed by the parties to be worthless. In subsequent rulings on creditors' claims, the United States District Court found that such rights were worthless; that the values attributable to A-OK's operating rights were related solely to the interstate authority.

11. See Appendix A, p. A106.

(A) which stated that a certificate of registration may not be transferred "apart from the transfer of the corresponding intrastate certificate." After reviewing the history of this 1962 amendment to the Interstate Commerce Act, the ICC concluded that its action "will not violate" such statutory prohibition but "will, in fact, accomplish the purpose for which such prohibition was designed."[12] This conclusion was consistent with the legislative history of the statute and the agency's long-standing interpretation and administration of the 1962 amendment and its predecessor provisions.

A-OK then filed a petition with the APSC requesting cancellation of its intrastate authority; the parties consummated their contracts; and the ICC issued certificates of public convenience and necessity to the applicants pursuant to §207 of the Act.[13]

Thereupon, protestant carriers (respondents here) sought review of the ICC's decision in the Court of Appeals.[14] On that appeal the court below stated that the proceeding involved an order of the ICC "granting authority for transportation of interstate freight to four multistate carriers, under Section 207 of the Interstate Commerce Act," but described "the controlling issue" as follows: "Does Division 3 have authority to effect a transfer of interstate rights under a registration certificate from a single

12. *Id.* at pp. A105-A106.

13. The certificates of registration formerly held by A-OK were thereupon cancelled. The applicants have continued to conduct operations under such PCN certificates pending disposition of these court proceedings and further orders of the ICC.

14. While the appeal was pending before the court below, the APSC, without objection from protestant carriers, granted A-OK's petition for cancellation of all of the bankrupt's intrastate authority. As stated in note 13, A-OK's interstate certificates of registration were cancelled by the ICC as a condition precedent to the issuance of the PCN certificates to the applicants.

state carrier to a multistate carrier in a proceeding which is not related to anything else?" The court concluded that the answer was "No," holding that "[t]he Supreme Court of Alabama effectively closed the door on applicants' meeting the 206(a)(7)(A) condition." The court ruled that under §206(a)(7)(A) a transfer of interstate authority, unaccompanied by a corresponding *transfer* of intrastate authority, "is simply not permitted under the statute."

Having reached the conclusion that the §5(2) transfer applications should have been denied, the court then considered the propriety of the ICC's approval of the §207 PCN applications. The court noted that under the ICC's Organizational Minutes that were then in effect, §207 PCN applications "unrelated" to other proceedings were assigned to Division 1 of the Commission for disposition, §5(2) transfer applications were assigned to Division 3, and when a §207 application was considered to be "directly-related" to a §5(2) application, it was also referred to Division 3 in order that the two applications could be considered together. Noting that the latter procedure was followed in these proceedings, the court concluded that the ICC's findings of public convenience and necessity must be set aside since the §5(2) transfer applications should have been denied and "Division 3 lacks authority to decide section 207 applications where they are not 'directly-related' to a section 5 transfer application." The court thereupon remanded the proceeding to the Commission with instructions that Division 3's order be vacated and set aside by Division 3, holding that such action would be "without prejudice to consideration of appropriate PCN applications by Division 1 of the Commission."[15]

Upon consideration of the petition for rehearing the court modified its order of remand and directed that "Di-

15. See Appendix A, p. A18.

vision 3's order now under review by vacated and set aside," and that such action shall be "without prejudice to further proceedings not inconsistent with this opinion."[16]

In neither of its opinions did the court take note of the provisions of §17 of the Interstate Commerce Act which provided [§17(4)] that *each* ICC division "shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions assigned or referred thereto . . . and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission," or of the provision [§17(3)] for the Commission to conduct its proceedings "in such manner as will best conduce to the proper dispatch of business and the ends of justice."

Although the court referred to the ICC's Organizational Minutes as the source of its practice of referring "directly-related" PCN applications to Division 3, the court overlooked the provision of such minutes which expressly recognized the statutory authority of each division to hear and determine *all* matters referred to it and to exercise with respect thereto "all the jurisdiction and powers conferred by law upon the Commission."[17]

REASONS FOR GRANTING THE WRIT

The ICC's order, vacated by the court, approved dual applications under §§5(2) and 207 of the Interstate Commerce Act. The Commission found that the §5(2) transfer applications should be approved because they were "consistent with the public interest," and that the §207 PCN applications should be granted because the evidence

16. See Appendix A, p. A20.

17. 30 Fed. Reg. 11189 (Aug. 31, 1965).

clearly established a public need for the services proposed by the applicants. This decision resulted in the continuation of extensive interstate service, found by the ICC to be needed by the public. It had no effect upon intrastate service since A-OK had requested cancellation of its intrastate authority.[18]

In spite of the fact that the ICC's decision could have no possible impact upon intrastate operations in Alabama, the Court of Appeals concluded that the ICC could not authorize a continuation of the bankrupt's interstate services by successor carriers since the APSC had decided that it would not be desirable for such carriers to perform *intra*state service as A-OK's successors. In holding that its conclusion was compelled by §206(a)(7)(A) (which prohibited a *transfer* of an interstate certificate of registration apart from a *transfer* of corresponding intrastate authority) the court ignored the provisions of §5(12), which gives the ICC "exlusive and plenary" authority to approve *all* aspects of *all* transactions subject to the ICC's jurisdiction under §5(2). *The decision below therefore confers upon state regulatory commissions the authority to nullify, for purely local reasons, findings by the ICC that the public interest requires a continuation of purely interstate services.*

In setting aside the Commission's findings of public convenience and necessity under §207, the court based its conclusion upon its view that the wrong 3-commissioner division entered such order, ignoring completely the provisions of §17(4) of the Act which expressly give to *each* division authority to hear and determine "any" matter referred to it and with respect thereto to exercise "all the

18. Such intrastate authority was ultimately cancelled by the APSC while this case was pending in the Court of Appeals.

jurisdiction and powers conferred by law upon the Commission."

Both conclusions of the court below are contrary to established precedents, as well as to the statute. Unless set aside by this Court, this decision stands for the propositions (1) that local state commissions can exercise crippling control over the ICC's functions and (2) that an administrative agency may not control the internal determination of its proceedings, in spite of express statutory authority therefor. In summary, this decision should be reviewed for the following reasons:

I.

The Decision Is in Conflict With This Court's Decision in *County of Marin* v. *U. S.* in That It Gives to State Regulatory Agencies a Veto Power Over the ICC's Grant of Purely Interstate Operating Authority, Thereby Nullifying the "Exclusive and Plenary" Power and Jurisdiction Expressly Granted to the ICC by §17(4) of the Act.

In *County of Marin* v. *United States*, 356 U.S. 411 (1958), this Court recognized that the ICC has "exclusive and plenary jurisdiction" over *all* aspects of transactions embraced within the purview of §5(2) of the Interstate Commerce Act. In that decision this Court recognized that §5(12) [then §5(11)] expressly confers upon the ICC authority to approve such transactions "without invoking any approval under State authority." In that decision it was explained that under §5 the jurisdiction of the ICC extends to "the transfer of intrastate operating rights along with the interstate operations of a carrier," and that §5(12) means that "the sustaining of federal jurisdiction leads, by statute, to the complete ouster of state authority." 356 U.S. at 418. Here, the ICC made no effort to assert

control "over the transfer of intrastate operating rights," expressly leaving that responsibility to the APSC. However, the Court of Appeals construed the 1962 amendment [49 U.S.C. §306(a)(7)(A)] as implying a Congressional intent to *reverse* the roles of the state and federal regulatory agencies, thereby emasculating the "exclusive and plenary" powers and jurisdiction of the ICC expressly conferred by §5(12). The court below, ignoring *County of Marin* and the provisions of §5(12), concluded that the decision of APSC, denying transfer of A-OK's *intra*state rights, foreclosed the ICC from granting authority to A-OK's successors to conduct purely *inter*state operations formerly conducted by the bankrupt carrier.

The decision of the court below also is in conflict with the only other decision arising under the 1962 amendment [§206(a)(7)(A)], as well as with the ICC's consistent interpretation and administration of such statute. In *Navajo Freight Lines, Inc.* v. *United States*, 263 F. Supp. 438 (C.D. Cal. 1967) the 3-judge district court discussed the ICC's practice of processing dual applications under §§5(2) and 207 to accomplish the transfer and reissue to a multistate carrier of interstate authority embraced within a single-state carrier's certificate of registration. That court, after reviewing the legislative history of §206(a)(7)(A), recognized that the ICC's established procedure [*C & D Motor Delivery Co.—Purchase—Elliott, supra*] simply provided that:

> ". . . in a hearing on public convenience and necessity past operations by single-state carriers over the route were relevant evidence of a need for the service. The changes wrought by the amendments [§206(a)(7)(A)] seem directed at the problem of the creation of new routes without any consideration of interstate needs rather than at altering the evidentiary require-

ments on a hearing before the Commission on an application for a certificate of public convenience and necessity. Nor do the amendments seem to be aimed at redefining the control and jurisdiction of the Commission in respect to mergers under §5." 263 F. Supp. at 446-7.

The Court of Appeals' holding frustrates the ICC's findings, under §§5(2) and 207, that the continuation of A-OK's interstate operations would fulfill a useful public purpose. It leaves the ICC subject to decisions of state agencies, based upon purely local considerations or, indeed, upon whim, caprice, or political influences.

This conclusion also permits a state regulatory agency to thwart the action taken by the bankruptcy court [represented here by petitioner] in liquidating the assets of A-OK for the benefit of its hundreds of creditors.

It is submitted that this Court needs to reverse the decision below so as to reinstate the proper federal-state relationship, as required by §5(12) and this Court's decision in *County of Marin*.

II.

In Setting Aside an Administrative Law Judge's Findings of PCN Because They Were Affirmed by the "Wrong" Division of the Commission, the Court Took the Very Type of Action the Statute Was Designed to Avoid.

Section 17(1) of the Act gives to the ICC authority to divide the members of the Commission into as many divisions as it may deem necessary and to assign any commissioner to any division or divisions. Section 17(2) provides that the Commission may direct that "any of its work, business, or functions . . . be assigned or referred to any

division. . . ." Section 17(3) provides that the Commission "shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Section 17(4) provides that each division "shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission, and be subject to the same duties and obligations." The Organizational Minutes of the Commission that were in effect at the time of its decision herein contained a provision identical to this provision of §17(4).[19]

With deference, it is submitted that it is rather obvious that §17 [not mentioned by the court below] was designed to avoid any question about the jurisdiction or authority of *any* division of the Commission to consider and dispose of *any* matter referred to it. Clearly, this was the purpose of giving each division "all the jurisdiction and powers conferred by law upon the Commission."

Interestingly, this decision of the Court of Appeals is in direct conflict with another decision within the same circuit, *Baggett Transp. Co.* v. *United States*, 116 F. Supp. 167 (N.D. Ala. 1953). Although *Baggett* is not a decision of a Court of Appeals, it was decided by a 3-judge district court within the Fifth Circuit, under the then prevailing review statutes which required ICC orders to be reviewed by such 3-judge courts. The court in *Baggett* considered and rejected the *identical* argument embraced by the Court of Appeals in the present case: that a finding of PCN under §207 was made by the "wrong" ICC division, *i.e.*, the

19. 30 Fed. Reg. 11189, *et seq.* (Aug. 31, 1965).

division that handled a related §5(2) transfer application. That court, citing §17 of the Act, termed such a contention an "absurdity," stating that "nothing but frustration" could result from a ruling that any division of the Commission cannot make all findings and decisions required in every proceeding referred to it.

With utmost deference, the decision of the court below does illustrate the "absurdity" of such a ruling. Here, the court has decreed that the ICC's findings of public convenience and necessity under §207 must be "vacated and set aside," thereby making necessary further proceedings in a case that has already been pending for almost eight years. That result was compelled, not because the ICC reached an erroneous result but because the court, ignoring completely the provisions of §17,[20] was of the view that the ICC had misapplied its own internal work assignments.

III.

The Decision Constitutes an Impermissible Judicial Interference Into the Decision-Making Process of the Administrative Agency.

No one has challenged the substantiality of the evidence supporting the ALJ's finding that public convenience and necessity required the applicants to continue the interstate operations formerly conducted by the bankrupt carrier.[21] Although §207 gives to the *Commission*, not to any specific division thereof, the authority to make findings of

20. At no point in either of its opinions did the court mention §17 or the decision in *Baggett*.

21. Such evidence included testimony of public need from 62 shipper witnesses and 5 connecting motor carriers, together with evidence of applicants' operations under temporary authority and of A-OK's past operations of its interstate authority.

PCN,[22] it is apparent that if the findings of PCN in the present case had been affirmed and adopted by Division 1 instead of by Division 3,[23] the court would have affirmed rather than remanded this case. Presumably, if such findings, upon remand, are reaffirmed and readopted by either Division 1 *or* Division 2, as these divisions are *presently* constituted,[24] such action will satisfy the court's judgment. As noted, however, this case has been pending for almost eight years and there is simply no need nor justification for further proceedings before the administrative agency.

It is respectfully submitted that the court below "improperly intruded into the agency's decision-making process," contrary to this Court's admonition in *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council, Inc., et al.*, ... U.S. ....., 55 L.Ed.2d 460, 468, 46 U.S.L.W. 4301, 4302 (April 3, 1978). As stated by this Court in that proceeding, "agencies should be free to fashion their own rules of procedure," and as long as the agency exercises its authority within statutory bounds, the reviewing court should not interfere with the internal assignment of the agency's caseload.

22. There is nothing in the Interstate Commerce Act or in the ICC's Rules of Practice that makes a distinction between a PCN application that is "directly-related" and one that is "unrelated" to some other proceeding. There is only one type of PCN application and only one criterion for approval thereof. See *Pan American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936).

23. Pursuant to established procedure, the parties filed their §207 PCN applications with the *Commission*, not with a division thereof, and the parties had no control whatever over the Commission's assignment thereof to Division 3.

24. As noted by the court in its second opinion, the ICC [presently composed of only 6 members] now has only two divisions. Cases are assigned to these divisions alternately. 42 Fed. Reg. 65181 (Dec. 30, 1977).

This proceeding illustrates the wisdom of this Court's admonition in *Vermont Yankee*. In its original decision, the court below remanded the case to the Commission for dismissal *by Division 3*. At that time, however, the Commission no longer had a Division 3, having reorganized its structure into only two divisions.[25] Even under the court's judgment as modified, however, the case must still go back to the Commission, and the Commission *must* vacate its order affirming and adopting the ALJ's findings of PCN, and then conduct further proceedings.

The court's action certainly cannot be justified on the theory [not suggested by anyone] that ICC commissioners are assigned to specific divisions because of their individual expertise in specific fields, since the Commisson has regularly rotated such assignments between divisions. The statute calls for 11 commissioners.[26] At the time of the final decision herein, there were only seven. However, during the course of its travels through the ICC, seven *different* commissioners voted at one time or another on the various orders entered in this case. At one stage *the entire Commission* voted on the case (see Order of June 28, 1974, App. B, p. A89).

It is respectfully submitted that this proceeding presents another case in which this Court should caution "reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee*, 55 L.Ed.2d at 468, 46 U.S.L.W. at 4302. The court below did not follow this admonition. Neither did it take note of the prior decision within its own circuit that it would be an "absurdity" to hold that a 3-commissioner division of the ICC

25. See note 24, *supra*.

26. 49 U.S.C. §11.

"lacked authority" to hear and dispose of any case referred to it for decision. Instead of sending this case back for further proceedings the court should have adopted the holding in *Baggett, supra,* that "nothing but frustration" could result from such a ruling. As the matter now stands, however, the ICC is faced with the necessity of conducting further proceedings before it can reconfirm findings and conclusions of PCN first made in January, 1973 (Appendix B, p. A21).

The ICC, like most regulatory agencies, is currently struggling to avoid being overwhelmed by its constantly increasing caseload. It needs and deserves help and support from reviewing courts. As long as it conducts its proceedings within its statutory authority, and reaches decisions that are supported by substantial evidence and otherwise conform to the requirements of the Administrative Procedure Act,[27] it should not be required to reprocess its proceedings in order to conform its internal work assignments to a reviewing court's concepts of propriety.

It has been over eight years since the bankruptcy court ordered the sale of the assets of this bankrupt motor carrier. That court's efforts to liquidate such assets for the benefit of creditors have, to date, been thwarted by the Court of Appeals' conclusion that the views of the APSC—not the ICC or the bankruptcy court—must prevail, even though the issue involves only the performance of service under interstate operating authority.

This case sets a precedent for the complete reversal of traditional federal-state relationships in the issuance and administration of interstate carrier authority. Such a precedent should not be allowed to prevail.

27. 5 U.S.C. §706.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinions of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

PHINEAS STEVENS
RHESA H. BARKSDALE
17th Floor, Deposit Guaranty Plaza
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Petitioner

Date: February, 1979

APPENDIX

APPENDIX A

NORTH ALABAMA EXPRESS, INC.
et al., Petitioners,

v.

UNITED STATES of America and
Interstate Commerce Commission,
Respondents.

No. 77-1341.

United States Court of Appeals,
Fifth Circuit.

July 17, 1978.

Protestants petitioned for review of a final order of the Interstate Commerce Commission which granted authority for transportation of interstate freight to four multistate carriers. The Court of Appeals, Vance, Circuit Judge, held that: (1) under the Interstate Commerce Act, interstate authority under a certificate of registration cannot survive and, therefore, cannot be "transferred" after elimination of the corresponding intrastate authority, and (2) division 3 of the Interstate Commerce Commission exceeded its authority when it approved the purchasing carriers' applications for certificates of public convenience and necessity where the applications involved nothing more than the applicants' proposed purchases and acquisition of a bankrupt carrier's interstate authority under its certificate of registration and were not "directly related" to a transfer application.

Order set aside and case remanded.

1. Commerce (Key) 105

To support an application for a certificate of public convenience and necessity as a motor carrier which is not made in conjunction with another application, applicant has burden to demonstrate that present or future public convenience and necessity would be served by the applicant's proposed new operation. Interstate Commerce Act, §§ 1 et seq., 207, 49 U.S.C.A. §§ 1 et seq., 307.

2. Commerce (Key) 85.27(2)

In determining whether present or future public convenience and necessity would be served by granting motor carrier's application for authority to transport interstate freight, the Interstate Commerce Commission looks to the adequacy of the existing facilities to meet present or future transportation requirements as well as to the desirability of competition and of different kinds of service. Interstate Commerce Act, §§ 1 et seq., 207, 49 U.S.C.A. §§ 1 et seq., 307.

3. Commerce (Key) 85.29(1), 85.30(1)

A motor carrier which operates within a single state and is not involved in a control relationship with an interstate carrier may qualify to carry interstate freight within the same scope as its intrastate operations without a certificate of public convenience and necessity if the carrier meets the requirements for a "certificate of registration" under either the "grandfather" provision or the provision relating to mergers, unifications and acquisitions. Interstate Commerce Act, §§ 5, 206(a)(7)(A), 207, 49 U.S.C.A. §§ 5, 306(a)(7)(A), 307.

4. Commerce (Key) 85.30(1)

Under the section of the Interstate Commerce Act which provides that rights of a motor carrier covered by certificates of registration may not be transferred apart from the transfer of the corresponding intrastate certificate, interstate authority under a certificate of registration cannot survive and, therefore, cannot be "transferred" after elimination of the corresponding intrastate authority. Interstate Commerce Act, §§ 5, 206(a)(7)(A), 207, 49 U.S.C.A. §§ 5, 306(a)(7)(A), 307.

5. Commerce (Key) 85.30(1)

Where proceeding before division 3 of the Interstate Commerce Commission did not involve any unification, merger or acquisition of control and where applications of purchasing motor carriers involved nothing more than their proposed purchase and acquisition of bankrupt intrastate carrier's interstate authority under its certificate of registration, division 3 of the Interstate Commerce Commission did not have authority to effect a transfer of interstate rights under a registration certificate from the single state carrier to a multistate carrier. Interstate Commerce Act, §§ 5, 206(a)(7)(A), 207, 49 U.S.C.A. §§ 5, 306(a)(7)(A), 307.

6. Commerce (Key) 85.27(1)

Division 3 of the Interstate Commerce Commission lacks authority to decide applications for certificates of public convenience and necessity where such applications are not directly related to transfer applications. Interstate Commerce Act, §§ 5(2), 207, 210a(6), 49 U.S.C.A. §§ 5(2), 307, 310a(6); Code of Ala., Tit. 48, § 301(15).

Maurice F. Bishop, Birmingham, Ala., for petitioners.

Mark L. Evans, Gen. Counsel, I.C.C., Henri F. Rush, Associate Gen. Counsel, Griffin B. Bell, U.S. Atty. Gen., U.S. Dept. of Justice, John H. Shenefield, Acting Asst. Atty. Gen., R. Craig Lawrence, I.C.C., Barry Grossman, Chief, App. Section, Dept. of Justice, Catherine G. O'Sullivan, Atty., Christine Kohl, I.C.C., Washington, D.C., for respondents.

David G. Macdonald, Washington, D.C., Phineas Stevens, Rhesa Barksdale, Jackson, Miss., Harry J. Jordan, Kim D. Mann, Washington, D.C., for intervenors.

Petition for Review of Orders of the Interstate Commerce Commission.

Before HILL, RUBIN and VANCE, Circuit Judges.

VANCE, Circuit Judge:

This case comes to us on petition for review of a final order of the Interstate Commerce Commission, Division 3, granting authority for transportation of interstate freight to four multistate carriers, under Section 207 of the Interstate Commerce Act (the "Act"), 49 U.S.C. Section 307.

A-OK Motor Lines, Inc., an Alabama corporation organized in 1960 (A-OK), was a common carrier by motor vehicle authorized to transport freight, over regular and irregular routes,[1] within Alabama. A-OK was authorized to carry intrastate freight pursuant to certificates issued by the Alabama Public Service Commission ("APSC"),

1. As used here, "regular route" authority means the authority to carry goods in a scheduled operation over a restricted and defined route; "irregular route" authority means the authority to carry goods in an unscheduled operation within a restricted territory but wholly unrestricted as to route.

and interstate or foreign freight pursuant to certificates of registration issued by the Interstate Commerce Commission.

A-OK ceased operations on October 20, 1970 and was adjudged bankrupt on November 17, 1970. The trustee in bankruptcy determined that A-OK's most valuable asset was its operating authority. With the approval of the bankruptcy court of the Middle District of Alabama, the trustee solicited bids for the sale of such authority. The successful bidders were four interstate carriers.[2] The trustee entered into four separate but similar contracts with such carriers, each of which concerns the transfer of separate portions of A-OK's operating authority.[3] Each contract was conditioned upon approval of such transfers of A-OK's operating authority by the APSC and I.C.C.

Appropriate applications were filed with the APSC[4] and I.C.C. and the required notices were published.[5] The

2. Reliable Truck Lines, Inc. (Reliable); Cooper Transfer Co., Inc. (Cooper); Gordon's Transports, Inc. (Gordon); The Mason & Dixon Lines, Inc. (M&D).

3. Proposed transfers of authority:

(a) Reliable—between Birmingham, Alabama and points within 15 miles thereof, on the one hand, and 2 named cities and towns, on the other.

(b) Cooper—between Birmingham, Alabama and points within 15 miles thereof, on the one hand, and 38 named cities and towns on the other.

(c) Gordon—between Birmingham, Alabama and points within 15 miles thereof, on the one hand, and 15 named cities and towns, on the other.

(d) M&D—between Birmingham, Alabama and points within 15 miles thereof and Mobile, Alabama, via U.S. Highway 31, serving intermediate points.

4. Under Title 48 § 301(15) of the *1958 Recompiled Code of Alabama.*

5. 49 CFR § 1100.240 requires that notice in the Federal Register be given of applications under § 5(2) (for transfer of

(*Continued on following page*)

carriers also filed applications with the I.C.C. for temporary operating authority under Section 210a(6) of the Act, 49 U.S.C. § 310a(6). The intrastate authority remained inactive since Alabama had no provision for temporary authority.

To aid understanding of the developments concerning such applications and our resolution of the issues now presented it is appropriate that we digress at this point for a consideration of the controlling sections of the Interstate Commerce Act.

Controlling Statutory Provisions

Section 206(a)(1) of the Act, 49 U.S.C. § 306(a)(1), forbids a common carrier by motor vehicle to engage in interstate commerce unless it shall have obtained and has in force a certificate of public convenience and necessity ("PCN") issued by the commission.

Section 207 specifies the findings on the basis of which such a certificate is issued. An application for such certificate may be either "related," *i. e.*, in conjunction with

---

Footnote continued—

A-OK's authority) and § 210a(6) (for temporary operating authority). Separate notices were published for each individual bidder (Federal Registers: April 14, 1971, pgs. 7088-89; April 21, 1971, pgs. 7562-63; April 28, 1971, pg. 8015), with each giving notice of the applicant's seeking authority to purchase "a portion of the operating rights of A-OK" and describing the "operating rights sought to be transferred." Federal Register notice of a "directly related" section 207 application was also given by each of the carriers (Federal Registers: June 23, 1971, pg. 11966; July 8, 1971, pg. 12881; Aug. 4, 1971, pg. 14366; Aug. 25, 1971, pg. 16720).

The notices read in part that, "[A]uthority sought herein corresponds to the authority set forth in certificates of registration applicant is purchasing from Sammuel Kaufman, Trustee in Bankruptcy for A OK Motor Lines, Inc., *in a directly related finance proceeding* pending before the Commission . . . published in the Federal Register . . . ." (Emphasis supplied).

another application; or it may be "unrelated," *i. e.*, by itself and not in conjunction with another such application.

[1, 2] To support an "unrelated" section 207 application the applicant has the burden of demonstrating that present or future public convenience and necessity will be served by the applicant's proposed new operation. *Curtis, Inc.* v. *United States*, 225 F.Supp. 894 (D.Colo.1964). In making such determination the commission looks to the adequacy of the existing facilities to meet present or future transportation requirements, the desirability of competition, different kinds of service and of improved service. *Lemmon Transport Co.* v. *United States*, 393 F.Supp. 838 (W.D.Va.1975).[6] An "unrelated" section 207 PCN certificate is issued, following application, proper notice and public hearings, by Division 1, the "Operating Rights Division," of the commission. *Organization Minutes of I.C.C.*, 26 F.R. 4773 (May 30, 1961).

[3] A carrier such as A-OK, which operates within a single state (and is not involved in a control relationship with an interstate carrier) may qualify to carry interstate freight within the same scope as its intrastate operations without a section 207 PCN certificate if it meets the requirements for a "certificate of registration" under either of two special provisions. The one applicable to the A-OK situation is a "grandfather" provision found in section

---

6. In *Pan American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936) the commission summarized the question which must be resolved in each case as a factual determination of

> [W]hether the new operation or service will serve a useful public purpose, [be] responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by [the] applicant with the new operation or service proposed without endangering or impairing the operation of existing carriers contrary to the public interest.

206(a)(7)(A), 49 U.S.C. § 306(a)(7)(A).[7] Interstate operations under a "certificate of registration" are regarded as incident to the carrier's intrastate operation. This section provides that "certificates of registration shall be valid only so long as the holder is a carrier engaged in operation solely within a single State. . . ."

Section 5, 49 U.S.C. § 5, makes lawful various mergers, unifications and acquisitions with the approval and authorization of the commission and prescribes certain procedures in connection with such transactions. Division 3 has the authority to hear section 5 applications relating to "acquisitions of control of carriers" and to hear section 208 applications that are "directly related" to a section 5 acquisition. *Organization Minutes of I.C.C., supra.* The applications now before the court were heard and decided by Division 3 as "directly related" to section 5 applications of the purchasing carriers.

Actions on the Applications

On October 30, 1972, the APSC issued an order denying the intrastate applications. An appeal was taken to the Circuit Court of Covington County, Alabama, which reversed the APSC.

---

7. Certificates of registration are issued either by Division 1 (where hearings are held or evidence is submitted by affidavit) or by the Operating Rights Board No. 1 (where no hearing is held or evidence submitted by opposing parties in the form of affidavits). *Organization Minutes of I.C.C., supra.* In general the requirement for a certificate of registration under this subsection involves a showing by the carrier that on October 15, 1962 it was in operation solely within a single state as a common carrier by motor vehicle in intrastate commerce and was also lawfully engaged in such operations in interstate commerce under the exemption provisions theretofore in effect. The other special provision is found in § 206(a)(6) and governs situations where the single state carrier was not in operation in interstate commerce on October 15, 1962.

On January 19, 1973 the Administrative Law Judge (the "ALJ") recommended approval of the section 5 and directly related section 207 applications *conditioned* upon surrender and cancellation of A-OK's certificates of registration and *upon approval of the transfer of the intrastate certificate by APSC* (which had been a condition in the contracts with the trustee and of the original applications). On December 13, 1973 Division 3 upheld the finding of the ALJ and denied the purchasing carriers' request that the the commission modify the ALJ's order to allow sale of A-OK's interstate authority prior to the final Alabama state court decision on A-OK's intrastate authority. In denying the request Division 3 cited section 206(a)(7)(A) for the prohibition against the certificate of registration being transferred "apart from the transfer of the corresponding intrastate certificate. . . ."

On May 30, 1974 Division 3 denied the purchasing carriers permission to amend the sales contracts to provide for the sale of the interstate operating rights, embodied in the certificates of registration (by way of issuing section 207 certificates) without the sale of the corresponding intrastate authority stating in part:

> [T]his Commission has consistently refused to sanction sale of rights embodied in a certificate of registration when the purchaser would not also acquire the corresponding intrastate authority, see *Cook Motor Lines, Inc.—Purchase (Portion)—Epperly Motor Freight, Inc.*, 116 M.C.C. 300 (1972), and hence the petitions must be denied in this respect.

On June 16, 1975 Division 3 denied the carriers' second petition for reconsideration, again holding that a certificate of registration could not be sold apart from the underlying intrastate rights.

Thereafter, on December 18, 1975, the Alabama Supreme Court reversed the lower court and unanimously upheld the ruling of the APSC denying the transfer of A-OK's intrastate authority. Rehearing was denied. In response to the Alabama Supreme Court's decision, the Circuit Court of Covington County, Alabama entered an order affirming the APSC and the Alabama litigation was final.

Following the Alabama Supreme Court's decision, the purchasing carriers filed their third petition for reconsideration with the commission. They proposed to surrender and cancel A-OK's certificates of registration; and to have Division 3 issue section 207 PCN certificates based on the evidence and testimony adduced at the original hearing on the section 5 and section 207 "directly related" applications.

On August 12, 1976 Division 3 reversed its prior action, granted the amended applications and, conditioned only upon *cancellation* by APSC of A-OK's intrastate operating authority, approved the proposed "transfer" of its interstate authority. That action prompted the present petition for judicial review by competitors who were protestants before the I.C.C.

Transfers Which Are Not Transfers

Since 206(a)(7)(A) clearly precludes the transfer of certificates of registration from carriers engaged in operation solely within one state (such as A-OK) to carriers engaged in more than one state, the uninitiated might well inquire at this point as to how the proposed transfers to Reliable, Cooper, Gordon and M&D would be possible in any event. The answer is found in a rather complicated administrative approach that developed over thirty years

ago. See, *e. g., The C & D Motor Delivery Co.-Purchase-Elliott,* 38 M.C.C. 547, 553 (1942). Carriers such as the purchasing carriers here have been allowed in effect to accomplish the transfer of interstate operating rights under a certificate of registration from a single state carrier by filing a section 5 application for approval of the acquisition transaction and a "directly related" section 207 application. These are the applications which in this instance were filed by the purchasing carriers. The section 207 application is necessary to satisfy the requirement of section 206(a)(1), *i. e.*, an interstate carrier may only operate in interstate commerce by the authority granted under a PCN certificate. Because the certificate of registration cannot be transferred to an interstate carrier, such carrier must obtain its own interstate authority by way of a "directly related" PCN certificate. Whether or not the procedure is correctly referred to as a transfer, interstate carriers thus have been allowed in practical effect to acquire the interstate authority that was previously held by the single state carrier under the certificate of registration.

Under the so-called Elliott Doctrine[8] such a "directly related" section 207 application may be supported by the intrastate carrier's past record to demonstrate that the present or future public convenience and necessity will be served by authorizing the interstate carrier to operate the routes. Thus the burden on the applying transferee is made significantly less difficult and his chances of success in obtaining interstate authority are enhanced.

It is understandable that in most respects such procedures are treated by the commission as transfers. The record before us reflects that in the present case they were so treated. A condition contained in section 206(a)

8. See *The C & D Motor Delivery Co.-Purchase-Elliott, supra.*

(7)(A) provides that rights covered by certificates of registration:

> may not be transferred apart from the transfer of the corresponding intrastate certificate.

And the succeeding provision states:

> The termination, restriction in scope, or suspension of the intrastate certificate shall on the 180th day thereafter terminate or similarly restrict the right to engage in interstate or foreign commerce unless the intrastate certificate shall have been renewed, reissued or reinstated or the restrictions removed within said one hundred eighty-day period.

These provisions were intended by Congress to control permitted transfers from one single state carrier to another single state carrier. Until its order of August 12, 1976, however, Division 3 and the ALJ treated them as if they controlled the present case.

We are aware that approval has been given by at least one three judge district court to the certificate of registration "transfer" device which has evolved within the commission; *Navajo Freight Lines, Inc.* v. *United States*, 263 F.Supp. 438 (C.D.Cal.1967); and are also aware of the contention that Congress has acquiesced in such practice. Distribution of regulatory authority in this overlapping area between state and federal regulatory agencies, however, is the studied product of congressional compromise. We should carefully examine transgressions of the imposed limits whether in substance or form.

The usual situation in which certificate of registration rights are being "transferred" to an interstate carrier involves some independent basis of Division 3's authority. The PCN application designed to work the "transfer"

usually is closely related to something: either an application for section 5 approval of a corporate merger or other acquisition, an agreement to purchase assets, and almost invariably (as was originally true here) acquisition of the underlying intrastate rights. In the present case, however, at the time of Division 3's last ruling on August 12, 1976 the purchasing carriers' applications covering A-OK's certificate of registration rights had been stripped of all connection with any other application. They were "directly related" to nothing.

The Issues Before The Court

[4] On review petitioners first challenge Division 3's authority to grant the purchasing carriers' applications on the basis of the "cancellation" rather than the "transfer" of A-OK's intrastate certificate. The commission and the purchasing carriers, who now appear as intervenors, answer that cancellation of A-OK's certificate avoided the evil Congress sought to prevent when it adopted the 1972 amendments which now appear in section 206(a)(7)(A) and section 206(a)(6), and that under a proper interpretation of those provisions Division 3's action complied with their requirements.[9] In presenting their respective con-

---

9. The incongruity of the commission's position is underlined by reference to the history of the 1962 amendments to the Act. The legislation was designed to correct recognized abuses involving the obtaining and transfer of interstate rights by the registration of intrastate certificates. Perhaps the problem might have been approached so as to permit the result for which the commission now contends. Neither the commission nor the Congress was then under the impression, however, that it was doing so.

In response to a request from the chairman of the House Committee on Interstate and Foreign Commerce for comments on the proposed measure, the commission's representative described its effect in a transfer situation by stating:

> In addition, any subsequent termination of or restriction in the scope of the intrastate certificate would similarly restrict

(*Continued on following page*)

tentions all parties thus approach the matter as if it were governed by the same rules applicable to permitted transfers from one single state carrier to another. Practices which are familiar are merely assumed to be legally permissible.

As an alternative or "fall back" position the commission and particularly the purchasing carriers contend that because the evidence overwhelmingly met the purchasing carriers' public convenience and necessity burden, Division 3 properly granted their applications wholly aside from the A-OK "transfer" as "unrelated" applications. Petitioners respond that Division 3 lacks such authority, particularly after the applications were noticed and heard as "directly related" to and conditioned on the A-OK "transfer." This brings us to what we consider to be the controlling issue: Does Division 3 have authority to effect a transfer of interstate rights under a registration certificate from a single state carrier to a multistate carrier in a proceeding which is not related to anything else?

Footnote continued—

the interstate rights. U.S.Code *Congressional and Administrative News*, 1962, Vol. 2, p. 3169.

Conference Report 2439, U.S.Code, Cong. & Admin.News 1962, p. 3171 reflects that the Senate conferees refused to accept two House amendments which would have altered the automatic termination of interstate authority under a certificate of registration 180 days after termination of the underlying state authority. As a consequence the amendments were deleted in conference and do not appear in the legislation as adopted. The intent of Congress is manifest. Interstate authority under a certificate of registration cannot survive—and not surviving cannot be "transferred"—after elimination of the corresponding intrastate authority.

In *All-American Transport, Inc.-Control and Merger-Pals Transfer, Inc.*, 109 M.C.C. 243, 249 (1969) the commission itself held:

> Registration authorities are granted on the basis of an underlying State certificate, and absent the State authority there is no basis for interstate authority. Congress recognized that

(*Continued on following page*)

Until the August 12, 1976 action by the commission these applications were treated by the parties, the ALJ and by Division 3 as involving sales and transfers of both interstate and intrastate operating authority.[10] The condition requiring transfer of the corresponding intrastate certificate in 206(a)(7)(A) was treated as being applicable.

[5] The Supreme Court of Alabama effectively closed the door on applicants' meeting the 206(a)(7)(A) condition. The only substantial matter left before Division 3 was the proposed sale and transfer of the authority previously held by A-OK to transport interstate freight under a certificate of registration. The nature of that authority was described in *Southern Pacific Transport Co. of Texas* v. *United States*, 369 F.Supp. 927 (N.D.Tex.1972) as:

> incident to the carrier's intrastate operation and the interstate authority, even after being granted cannot exist in the absence of the corresponding intrastate authority.

Footnote continued—

> a certificate of registration would be automatically voided if the intrastate certificate were revoked, by adopting the 180-day grace period. The statutory 180-day grace period was recognition that, but for the grace provision, a carrier would have no opportunity to reestablish its state certificate and thereby prevent the revocation of the interstate certificate of registration. Moreover, where the intrastate right is transferred apart from the certificate of registration, the certificate would be destroyed again because *the carrier has no interstate certificate without the possession of an intrastate certificate.* (Emphasis supplied.)

And in *Daniels* v. *United States*, 210 F.Supp. 942, 951 (D.Mont. 1962), *aff'd* 372 U.S. 704, 83 S.Ct. 1018, 10 L.Ed.2d 124 (1963), another three judge district court stated:

> Under Section 206(a)(1) both prior to amendment and after amendment, intrastate rights and an intrastate certificate form the basis of acquisition of interstate rights within the state. No grant of interstate rights is contemplated to a carrier who has no corresponding intrastate rights.

10. Aside from operating authority, an insignificant amount of other property was involved in one of the applications.

No unification, merger or acquisition of control was involved. The applications of the purchasing carriers involved nothing more or less at this point than their proposed purchase and acquisition of A-OK's interstate authority under its certificate of registration—authority which cannot continue to exist independent of the underlying intrastate authority. A naked transfer of that authority to interstate carriers is simply not permitted under the statute. Further pursuit by the purchasing carriers of the interstate authority sought should have been by way of an "unrelated" section 207 application before Division 1 of the commission.

[6] Division 3 exceeded its authority when it reversed its prior rulings and approved the purchasing carriers' newly transmuted and "unrelated" section 207 applications. Division 3 lacks authority to decide section 207 applications where they are not "directly related" to a section 5 transfer application. In *Hart* v. *I.C.C.*, 226 F. Supp. 635, 643 (D.Minn.1964) the court held:

> The commission, after stating its finding that the purchase application did not present a transaction within the scope of Sec. 5(2) of the Act, said that "the application and the related application under Sec. 207 [the PCN application] should be dismissed." This decision was made by division 3 of the Commission. Division 1 of the Commission has the responsibility for determining applications under Sec. 207 of the Act. Organization Minutes of I.C.C., 26 F.R. 4773 (May 30, 1961). Division 3 can only consider Sec. 207 applications which are "directly related" to Sec. 5(2) applications for purchases, consolidations, etc. *ibid.* Therefore the Commission decision to dismiss the PCN application resulted from its decision that it had no jurisdiction to consider the purchase application. Without a Sec. 5(2) application to decide division 3 would exceed its responsibility if it decided a Sec. 207(a) application.

The correctness of the *Hart* holding is supported by *Best Way Motor Freight, Inc.* v. *United States*, 253 F.Supp. 314 (W.D.Wash.1966) and rulings of the commission itself. See, *e. g., The C & D Motor Delivery Co.-Purchase-Elliott, supra; All-American Transport, Inc.-Control and Merger-Pals Transfer, Inc., supra.*

We do not reach the questions concerning the sufficiency of notice and whether the evidence is sufficient to support an "unrelated" application if the testimony taken under the Elliott Doctrine were eliminated. Our decision makes such further inquiry inappropriate. On their face, however, the procedures of Division 3, including its hindsight weighing of the evidence and its mutation of issues from those noticed, unnecessarily present problems of serious magnitude.

Here, four multistate carriers seek the right to transport interstate freight over routes formerly authorized to a single state carrier. What began as a "transfer" from one bankrupt intrastate carrier emerged over five years later as four separate authorities held by four interstate carriers. This may give some insight into the following characterization by the APSC:

> The record establishes, and we so find, that when the proposed division of this authority is considered in conjunction with the authorities presently held by the applicants, and the tacking[11] that would be possible

11. Tacking is operation by a carrier between two or more of its regular routes or between irregular and regular routes in order to reach a point which could not legally be served by operation over any single irregular or regular route or combination of regular routes. It is a joinder of separate grants of authority at a point common to both.

> . . . we are not being asked to approve the revival of the A-OK's rights but to approve a major readjustment of the transportation industry of Alabama. *Alabama Public Service Comm.* v. *Cooper Transfer Co.*, 295 Ala. 209, 326 So.2d 283, 286 (1975).

The matter is obviously of substantial importance. It has now extended over an inordinate number of years and should be brought to a conclusion. On the record before us, however, we are not free to effect such a result without compromising the congressional purpose as expressed in the Act and the integrity of the commission's own processes.

Division 3's order now under review is due to be vacated and set aside and the case remanded to the Interstate Commerce Commission for dismissal by that division. Such action is without prejudice to consideration of appropriate PCN applications by Division 1 of the commission.

ORDER SET ASIDE AND CASE REMANDED.

NORTH ALABAMA EXPRESS, INC., a corporation, et al., Petitioners,

v.

UNITED STATES of America and Interstate Commerce Commission,

Respondents.

No. 77-1341.

United States Court of Appeals, Fifth Circuit.

Nov. 6, 1978.

Maurice F. Bishop, Birmingham, Ala., for petitioners.

Mark L. Evans, Gen. Counsel, I. C. C., Henri F. Rush, Associate Gen. Counsel, Griffin B. Bell, U. S. Atty. Gen., U. S. Dept. of Justice, John H. Shenefield, Acting Asst. Atty. Gen., R. Craig Lawrence, I. C. C., Barry Grossman, Chief, Appellate Section, Catherine G. O'Sullivan, Atty., Dept. of Justice, Christine N. Kohl, I. C. C., Washington, D. C., for respondents.

David G. Macdonald, Washington, D. C., Phineas Stevens, Rhesa H. Barksdale, Jackson, Miss., Harry J. Jordan, Kim D. Mann, Washington, D. C., for intervenors.

Petition for Review of an Order of the Interstate Commerce Commission.

ON PETITION FOR REHEARING

Before HILL, RUBIN and VANCE, Circuit Judges.

VANCE, Circuit Judge.

On consideration of the petition for rehearing the last paragraph of the panel opinion of July 17, 1978, 576 F.2d

679, is withdrawn and the following substituted in lieu thereof:

The case is remanded to the Interstate Commerce Commission with instructions that Division 3's order now under review be vacated and set aside.[12] Such action is without prejudice to further proceedings not inconsistent with this opinion.

---

12. During the pendency of this case in this court the Commission amended its rules and restructured its divisions. 42 FR 65181 (Dec. 30, 1977). There are now two divisions and they have concurrent jurisdiction.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. MC-F-11133[1]

(Service Date January 19, 1973)

RELIABLE TRUCK LINES, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY).

Decided .....

1. In No. MC-F-11133, purchase by Reliable Truck Lines, Inc. of a portion of the operating rights of A-OK Motor Lines, Inc., and acquisition of control of said operating rights by Garland Parsley through the purchase, approved and authorized, subject to conditions.[2]

2. In No. MC-128944 (Sub-No. 9), public convenience and necessity found to require operation by Reliable Truck Lines, Inc. as a common carrier by motor vehicle in interstate or foreign commerce, of general commodities, with the usual exceptions, between cer-

---

1. This report also embraces: (a) No. MC-128944 (Sub-No. 9), Reliable Truck Lines, Inc., Extension—Alabama; (b) No. MC-F-11134, Cooper Transfer Co., Inc.—Purchase (Portion)—A-OK Motor Lines, Inc. (Sammuel Kaufman, Trustee in Bankruptcy); (c) No. MC-55889 (Sub-No. 39), Cooper Transfer Co., Inc., Extension—Alabama; (d) No. MC-F-11143, Gordons Transports, Inc.—Purchase (Portion)—A-OK Motor Lines, Inc. (Sammuel Kaufman, Trustee in Bankruptcy); (e) No. MC-11220 (Sub-No. 123), Gordons Transports, Inc., Extension—Alabama; (f) No. MC-F-11150, The Mason & Dixon Lines, Inc.—Purchase (Portion)—A-OK Motor Lines, Inc. (Sammuel Kaufman, Trustee in Bankruptcy); (g) No. MC-59583 (Sub-No. 130), The Mason & Dixon Lines, Inc., Extension—Alabama.

2. Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above. Replies thereto may be filed within 20 days after the final date for filing exceptions.

tain named points in Alabama. Issuance of a certificate approved upon compliance by the applicant with certain conditions, and application in all other respects denied.

3. In No. MC-F-11134, purchase by Cooper Transfer Co., Inc. of portions of the operating rights and certain property of A-OK Motor Lines, Inc., and acquisition of control of said operating rights and property by AAA Motor Lines, Inc., and John H. Dove through the purchase, approved and authorized, subject to conditions.

4. In No. MC-55889 (Sub-No. 39), public convenience and necessity found to require operation by Cooper Transfer Co., Inc. as a common carrier by motor vehicle in interstate or foreign commerce, of (1) general commodities, with the usual exceptions, and (2) explosives, between certain named points in Alabama. Issuance of a certificate approved upon compliance by the applicant with certain conditions, and application in all other respects denied.

5. In No. MC-F-11143, purchase by Gordons Transports, Inc. of a portion of the operating rights of A-OK Motor Lines, Inc. and the acquisition by M. M. Gordon, A. W. Gordon, Jr., J. K. Gordon, Esther G. Cato, and Mary G. Conaway of control of such operating rights through the purchase, approved and authorized, subject to conditions.

6. In No. MC-11220 (Sub-No. 123) public convenience and necessity found to require operation by Gordons Transports, Inc. as a common carrier by motor vehicle in interstate or foreign commerce of general commodities, with the usual exceptions, between certain named points in Alabama. Issuance of a certificate

approved upon compliance by applicant with certain conditions, and application in all other respects denied.

7. In No. MC-F-11150, purchase by Mason & Dixon Lines, Inc., of a portion of the operating rights of A-OK Motor Lines, Inc., and the acquisition by E. William King, Margaret K. Norris, and John R. King of control of such operating rights through the purchase, approved and authorized, subject to conditions.

8. In No. MC-59583 (Sub-No. 130) public convenience and necessity found to require operation by Mason & Dixon Lines, Inc., as a common carrier by motor vehicle in interstate or foreign commerce, of general commodities, with the usual exceptions, between certain named points in Alabama. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Phineas Stevens, John A. Crawford, J. Clarence Evans, A. Alvis Lane, Kim D. Mann, Carl W. Eilers, and *Warren A. Goff* for applicants.

Clifford M. Spencer, Jr. for intervenor in support of application.

John P. Carlton, Walter Harwood, Robert S. Richard, Blaine Buchanan, E. Larry Wells, and *Lawrence A. Winkle* for protestants.

REPORT AND RECOMMENDED ORDER BY ADMINISTRATIVE LAW JUDGE WILLIAM J. GIBBONS

Nature and Scope of Applications

No. MC-F-11133: By joint application filed April 6, 1971, Reliable Truck Lines, Inc. (Reliable) of Nashville,

Tenn. and Sammuel Kaufman, Trustee in Bankruptcy (trustee) of Montgomery, Ala., for A-OK Motor Lines, Inc. (A-OK) seek authority under section 5 of the Interstate Commerce Act for the purchase by Reliable of a portion of the operating rights of A-OK contained in certificate of registration No. MC-121218 (Sub-No. 1) for a total purchase price of $130,000. In the same application, Garland Parsley seeks authority to control the operating rights through the proposed transaction.[3]

No. MC-F-11134: By joint application filed April 6, 1971, Cooper Transfer Co., Inc. (Cooper) of Brewton, Ala., and the trustee seek authority under section 5 for the purchase by Cooper of portions of the operating rights of A-OK contained in its certificates of registration No. MC-121218 (Sub-Nos. 1 and 2) for $50,000, and terminal property at Decatur, Ala. for $32,000. In the same application, AAA Motor Lines, Inc., and John H. Dove seek authority to control the operating rights and property through the proposed transaction.

No. MC-F-11143: By joint application filed April 12, 1971, Gordons Transports, Inc. (Gordons) of Memphis, Tenn., and the trustee seek authority under section 5 for the purchase by Gordons of a portion of the operating rights of A-OK contained in certificate of registration No. MC-121218 (Sub-No. 1) for $130,000. In the same application, M. M. Gordon, A. W. Gordon, Jr., J. K. Gordon, Esther G. Cato, and Mary G. Conaway seek authority to control the operating rights through the proposed transaction.

---

3. Since Reliable and each of the three other prospective vendees are multi-state carriers, it is necessary for each of them to convert the certificates of registration into certificates of public convenience and necessity. They seek to do so herein by the filing of appropriate applications under section 207 of the Act.

No. MC-F-11150: By joint application filed April 20, 1971, as amended, The Mason and Dixon Lines, Inc. (M & D) of Kingsport, Tenn., and the trustee seek authority under section 5 for the purchase by M & D of a portion of operating rights of A-OK contained in certificate of registration No. MC-121218 (Sub-No. 1) for a total purchase price of $305,000. E. William King, Margaret K. Norris, and John R. King join in this application as applicants for authority to control the operating rights through the proposed transaction.

No. MC-128944 (Sub-No. 9): By this application filed July 16, 1971 (which is directly related to the application in No. MC-F-11133), Reliable seeks a certificate of public convenience and necessity under section 207 of the Act authorizing it to engage in operations in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, in the transportation of general commodities (except those of unusual value, household goods as defined by the Commission, commodities in bulk, dangerous explosives and commodities requiring special equipment) between Birmingham, Ala., and points within 15 miles thereof, on the one hand, and Tuscumbia and Sheffield, Ala., on the other hand. Reliable proposes to tack the authority sought with its basic regular route authority at Sheffield and/or Tuscumbia, and through joinder would serve Memphis, and Nashville, Tenn., and several points in northern Alabama.

No. MC-55889 (Sub-No. 39): By this application filed June 18, 1971, as amended, (which is directly related to the application in No. MC-F-11134), Cooper seeks a certificate of public convenience and necessity under section 207 authorizing it to operate, in interstate or foreign commerce, as a common carrier by motor vehicle, in the transportation of: (1) Explosives, over regular routes, between the

U.S. Ordnance Depot located at or near Bynum, Ala., and Camp Rucker, Ala., from Bynum over U.S. Highway 78 to Anniston and Oxford, thence to the junction of Alabama Highway 37 to Opelika, thence over U.S. Highway 29 to Banks, thence over U.S. Highway 231 to Ozark, thence over Alabama Highway 85 to Camp Rucker, and return over the same routes, serving no intermediate points; (2) general commodities (except commodities in bulk), over regular routes, between Montgomery and Opp, Ala., over U. S. Highway 331, serving no intermediate points; and (3) general commodities (except commodities in bulk) over irregular routes, between Birmingham, Ala., and points within 15 miles thereof, on the one hand, and on the other Andalusia, Athens, Auburn, Brundidge, Citronelle, Clayton, Cullman, Decatur, Demopolis, Dothan, Elba, Enterprise, Eufaula, Eutaw, Fairhope, Fayette, Flomation, Florala, Foley, Greensboro, Haleyville, Hartselle, Headland, Huntsville, Jasper, Linden, Luverne, Monroeville, Opp, Ozark, Robertsdale, Russellville, Samson, Stevenson, Troy, Tuscaloosa, Union Springs and Uniontown, Ala. Cooper proposes to tack the authority sought with its existing authority in order to provide a through service to and from points it is authorized to serve in Alabama, Florida, Georgia, and Louisiana.

No. MC-11220 (Sub-No. 123): By this application filed May 14, 1971 (which is directly related to the application in No. MC-F-11143), Gordons seeks a certificate of public convenience and necessity under section 207 authorizing it to operate in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, in the transportation of commodities generally (except Classes A and B explosives, household goods as defined by the Commission, commodities in bulk and those requiring special equipment) between Birmingham, Ala., and points

within 15 miles thereof, on the one hand, and on the other, Albertville, Alexander City, Boaz, Centre, Fairfax, Ft. Payne, Guntersville, Oneonta, Opelika, Phenix City, Scottsboro, Sylacauga, Talladega, Tuskegee and Wetumpka, Ala. Gordons proposes to tack the authority sought with its existing authority at Birmingham.

No. MC-59583 (Sub-No. 130): By this application filed June 30, 1971 (which is directly related to the application in No. MC-F-11150) M & D seeks a certificate of public convenience and necessity under section 207 authorizing it to operate in interstate or foreign commerce as a common carrrier, over regular routes, in the transportation of general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading) between Birmingham, Ala., and points within 15 miles thereof, and Mobile, Ala., and points within 10 miles thereof, over U.S. Highway 31, serving all intermediate points and the off-route points of Kilby, Prattville and Siluria, Ala. M & D intends to tack the authority sought with its existing authority at Birmingham in order to render through service to and from points to be acquired.

By Commission orders,[4] Reliable, Cooper, Gordons and M & D were granted temporary authority under section 210a(b) to lease and operate the specified portions of the property to be purchased pending determination of their section 5 applications. Operations under the temporary authority commenced during May 1971. Each vendee has filed an application with the Alabama Public Service Com-

4. These separate orders are dated April 28, 1971 in No. MC-F-11133; May 4, 1971 in No. MC-F-11134, No. MC-F-11143, and in No. MC-F-11150, as extended on September 15, 1971.

mission for authority to purchase corresponding portions of A-OK's intrastate rights; those applications are still pending, and no temporary operations or lease have been authorized by the Alabama Commission.

The Commission referred the section 5 applications to a hearing examiner, and the section 207 application to designated Joint Boards for hearing and for the recommendation of an appropriate order thereon, accompanied by the reasons therefor. The Joint Boards waived jurisdiction for failure to appear. Hearings on the applications were conducted on a consolidated record by Melvin L. Winson,[5] Hearing Examiner, at Birmingham, Ala., on January 18, 1972 through January 21, 1972, January 24, 1972 through January 28, 1972, and on March 28-29, 1972. Briefs have been filed. At the hearings, 10 motor common carriers, namely, Baggett Transportation Company (Baggett), Bee Line Express, Inc. (Bee Line), Bowman Transportation, Inc. (Bowman), Georgia-Florida-Alabama Transportation Company (GFA), Floyd & Beasley Transfer Company, Inc. (F & B), Hall Motor Express, Inc. (Hall), Hiller Truck Lines, Inc. (Hiller), North Alabama Express, Inc. (North Alabama), Ross Neely Express, Inc. (Neely), and Central Motor Express, Inc. (Central) appeared in opposition to the grant of all the applications. Birmingham-Nashville Express, Inc. (Birmingham-Nashville) appeared to oppose Reliable's applications, and Braswell Motor Freight, Inc. (Braswell) opposes Gordons' applications. R. C. Motor Lines, Inc. appeared as a protestant for the apparent purpose of protecting its interest as a creditor of A-OK.

5. Mr. Winson retired from the federal service since the close of the hearings, and because of his unavailability, the proceedings were referred to the undersigned for the preparation and issuance of a report and recommended order.

A-OK's Operating Authority

A-OK, an Alabama corporation organized in 1960, is a motor common carrier authorized to transport property, over regular and irregular routes, within the State of Alabama in intrastate commerce pursuant to certificates of public convenience and necessity issued by the Alabama Public Service Commission, and in interstate or foreign commerce pursuant to certificates of registration issued by the Interstate Commerce Commission. It acquired its authority from the Jack Cole Company. A-OK's certificates authorize the transportation of (1) general commodities over irregular routes between Birmingham, Ala., and all points within 15 miles thereof, on the one hand, and on the other, numerous named points in Alabama, (2) explosives over a regular route between the U.S. Ordnance Depot at or near Bynum, Ala., and Camp Rucker, Ala., via specified highways, with no service to intermediate points, and (3) general commodities (except commodities in bulk) over a regular route between Montgomery and Opp, Ala., with no service to intermediate points. A-OK ceased operations on October 20, 1970, and was adjudged a bankrupt on November 17, 1970.

A-OK's Operations Prior to October 20, 1970

A-OK was a relatively small distribution type carrier, handling primarily less-than-truckload traffic to and from Birmingham and other communities in Alabama. The hub of its operations was Birmingham. Approximately 25 percent of its business was intrastate traffic and 75 percent was interstate. It competed mainly with other short-haul carriers such as Baggett, Ross Neely, and AAA Motor Lines, Inc., its participation in interstate commerce being limited to traffic interchanged with other carriers. It had terminals at Birmingham, Decatur, Dothan, Opp, and Mobile,

and agents at Monroeville serving Sylacauga and Talladega; its Birmingham terminal was used for sales, claims, billing and over-the-road dispatching, and the Opp terminal for accounting and maintaining records. Prior to bankruptcy, A-OK's equipment consisted of 16 pick-up trucks, 23 tractors and between 105 and 110 trailers;[6] it employed 75 employees, 3 full-time owner-operators, and a number of leased operators, performing interchange operations at Birmingham, Montgomery, Mobile and Sheffield. Its principal point of interchange was Birmingham where it interchanged with every major carrier, including Gordons and M & D. At Sheffield, A-OK interchanged with Reliable, and at Mobile with Campbell's Sixty-Six and Red Ball. For some time Cooper and A-OK had interlined some traffic with each other but the arrangement was discontinued because of A-OK's financial difficulty and failure to pay interline accounts.

During the period April 1, 1970 until A-OK ceased operations on October 20, 1970, it transported a total of 3,103 shipments, weighing 4,539,693 pounds, a portion of which, as shown below, was interchange with the vendees at various points. As indicated, interchange was also effected with carriers other than the vendees. The traffic handled by A-OK included a wide variety of general commodities ranging from picture frames to plumbing supplies.

During that period A-OK interchanged traffic with Reliable totalling 3,076 shipments, weighing 2,620,845 pounds, all of which was moved by A-OK between Birmingham and Sheffield—part of A-OK's authority sought to be purchased by Reliable. In the same period, A-OK participated in joint-line operations with other carriers in

6. In early 1970, after control of A-OK passed to Thornton Cole, two terminals were added at Guntersville and Evergreen. Later in 1970, A-OK began to reduce its equipment by releasing 10 to 15 trailers to creditors.

the transportation of 237 shipments, weighing 362,583 pounds, which moved beyond A-OK's line to and from numerous points served by Cooper in Alabama, Georgia, Florida and Louisiana. During this period, A-OK transported a total of 1,410 shipments between Birmingham and the majority of the points Cooper seeks to serve. In addition, Cooper and A-OK handled 10 shipments in joint-line service through the Montgomery gateway. Also, in this period, A-OK interlined 1,042 shipments, weighing 541,657 pounds, with Gordons and other carriers at Birmingham, originating or destined to points served by Gordons. During the same period, M & D interlined 239 shipments with A-OK at Birmingham, of which 154 shipments, weighing 202,856 pounds, moved to or from 15 different points which M & D seeks to acquire. The remaining shipments moved to and from points being acquired by other vendees. In addition, A-OK handled 1,301 interstate joint-line shipments with carriers other than M &D pursuant to authority M & D is seeking to acquire.

A-OK's Financial Status

For some years prior to bankruptcy, A-OK had been experiencing financial difficulty. In 1968, it suffered a loss of $49,616 on operating revenues of $1,327,437, and expenses of $1,377,054. In 1969, it had operating revenues of $1,463,985, operating expenses of $1,810,887, and a resultant loss of $346,901. For the first 6 months of 1970, A-OK sustained a loss of $221,857 on operating revenues of $572,177, and operating expenses of $794,035. In January 1970, Wheels, Inc., a noncarrier controlled by Thorton Cole, acquired control of A-OK, and although business increased in 1970, A-OK's financial condition worsened. Finally, lack of operating capital forced A-OK to cease operating in mid-October 1970. Pursuant to a petition filed by creditors on November 6, 1970, the Referee in Bankruptcy for the United

States District Court for the Middle District of Alabama, Northern Division, hereinafter referred to as the Bankruptcy Court, adjudged A-OK a bankrupt on November 17, 1970. At or about the same time, Sammuel Kaufman was appointed trustee of the estate of A-OK, his appointment was approved by the Bankruptcy Court, and he continues to serve in that capacity.

Trusteeship

Upon the approval of his appointment, the trustee took immediate steps to collect the assets of the bankrupt and preserve its records. Lacking operating capital, the trustee stated that it was not practicable for him to resume operations of the bankrupt. The Bankruptcy Court, by an order dated February 19, 1971, authorized the trustee to sell free and clear of liens all of the bankrupt's property, including its operating authority, tractors, trailers, office furniture and equipment, unclaimed freight, and real estate.[7]

With the court's approval, the trustee sent out notices of sale to some 277 persons, including carriers and individuals with whom A-OK had conducted business. The notice of sale, covering only the operating authority of A-OK, called for the submission of sealed bids to the trustee on or before March 18, 1971 and the opening of the bids in the Bankruptcy Court. In the notice of sale, the trustee reserved the right to enter into negotiations with the highest and best bidders. Twenty-five bids were submitted, including those of the vendees herein and those of several protestants. The trustee, finding no bid entirely

7. Trucks and tractors of the bankrupt were sold at public auction for about $50,000; office supplies, equipment, unclaimed and salvaged freight sold for about $25,000; recovery of accounts receivable was less than $50,000; the Opp terminal was sold for $5,000; the Dothan terminal for $6,000; and the Decatur terminal was sold to Cooper for $32,000 contingent upon approval of its application herein. Leases on other terminals were terminated.

acceptable, negotiated with certain bidders concerning the terms of their bids, and received separate offers from Reliable, Cooper, Gordons, and M & D, aggregating $615,000, which he recommended to the Bankruptcy Court for approval. By order of March 19, 1971, the Bankruptcy Court authorized the trustee to accept the offers of Reliable, Cooper, Gordons and M & D and to execute all the contracts necessary to memorialize the sales.[8]

Transactions

The terms of the proposed transactions are set forth in separate agreements entered into by the trustee and the prospective vendees on April 1, 1971. The agreements were approved by the Bankruptcy Court on May 4, 1971. Except for the purchase price, monthly rental and rights to be purchased, the agreements are identical. The agreements cover the lease and sale of the bankrupt's intrastate rights as well as its interstate rights.

Under the agreement between the trustee and Reliable, the trustee agreed to sell to Reliable the portion of the bankrupt's operating rights authorizing the transportation of commodities generally, over irregular routes, between Birmingham, Ala., and points within 15 miles thereof, on the one hand, and Tuscumbia, and Sheffield, Ala., on the other hand, for $130,000, and to lease the rights to Reliable for $1,300 a month.

Under the agreement between the trustee and Cooper, the trustee agreed to sell to Cooper portions of the bankrupt's operating rights authorizing the transportation of

8. One bid in the amount of $361,000, subsequently raised to $461,000, was received for the entire operating authority of the bankrupt. The aim of the trustee was to obtain bids aggregating $550,000, a figure that the secured creditors would consider reasonable. Secured claims amount to $648,530.

(1) explosives, over regular routes, between the U.S. Ordnance Depot at or near Bynum, Ala., and Camp Rucker, Ala., over specified highways, serving no intermediate points; (2) general commodities, except commodities in bulk, over regular routes, between Montgomery and Opp, Ala., over U.S. Highway 331, serving no intermediate points, and (3) general commodities, over irregular routes, between Birmingham, Ala., and points within 15 miles thereof, on the one hand, and 38 specified points in Alabama, on the other hand. The purchase price agreed upon for the rights was $50,000, and the rental to be paid for lease of the rights was $500 a month. The agreement also covers the sale of A-OK's Decatur terminal to Cooper for $32,000.

Under the agreement between the trustee and Gordons, the trustee agreed to sell to Gordons the portion of the bankrupt's operating rights authorizing the transportation of commodities generally, over irregular routes, between Birmingham, Ala., and points within 15 miles thereof on the one hand, and 15 named points in Alabama on the other hand, for $130,000, and to lease the rights to Gordons for $1,300 a month.

Under the agreement between the trustee and M & D, the trustee agreed to sell the portion of the bankrupt's operating rights authorizing the transportation of commodities generally, over regular routes, between Birmingham, Ala., and all points within 15 miles thereof, and Mobile and all points within 10 miles thereof, via U.S. Highway 31, serving all intermediate points, and the off route points of Kilby, Prattville and Siluria, Ala., for $305,000, and to lease the rights to M & D for $3,050.00 a month.

Among other things, the agreements provide for the payment to the trustee of earnest money equivalent to three months rent, and provide further that the unpaid

portion of the purchase price shall be paid by each vendee on the date the transactions are consummated, and that in computing the purchase price, all rental payments and earnest money paid to the trustee will be deducted. None of the agreements make any allocation of the purchase price as between intrastate and interstate rights. Each agreement contains a provision that consummation of the sale and transfer of the operating rights to the vendees shall be subject to approval by the Alabama Public Service Commission and the Interstate Commerce Commission, and that if either of said Commissions denies the proposal, the agreement shall thereupon terminate and be of no force and effect. Also, each agreement would permit the vendee to terminate the agreement in the event that either Commission impose conditions prohibiting or restricting tacking or joinder.

Vendees' Operations and Financial Status

Under certificates issued in No. MC-128944 and sub-numbered proceedings, Reliable operates in interstate or foreign commerce as a common carrier of general commodities, over regular routes, between Nashville, Tenn., and certain northern Alabama points, including Florence, Sheffield, and Tuscumbia, and between Memphis and essentially the same Alabama points.[9] Reliable owns and operates 27 trucks, 32 tractors, and 83 trailers; it has terminals in Memphis, Huntsville, and Sheffield, and since commenc-

9. Under No. MC-F-10880, Reliable is temporarily operating the authority of Robert F. Coates extending from Florence and Sheffield eastwardly to Athens, Decatur and Huntsville, and thence to Stevenson, Ala. The application respecting Coates' authority is pending exceptions to an adverse recommended report and order. Reliable's application in No. MC-128944 (Sub-No. 8), for authority between Memphis and that part of its commercial zone in Tennessee and Birmingham, with closed doors at intermediate points, over certain specified routes, was approved by decision and order dated March 1, 1972, of Review Board No. 3.

ing operations into Birmingham under its temporary authority, it leased a terminal and two repair shops in Birmingham.

As of November 30, 1971, Reliable's balance sheet reflects total assets of over $1.4 million, current assets of $410,351, current liabilities of $292,858, and a net worth of approximately $177,000. Through November 30, 1971, Reliable had revenues of $1.6 million and net income of $128,646 transferred to surplus, or $64,323 after taxes. During the period June 1, 1971 through November 30, 1971, under its temporary authority, Reliable handled 1,269 loads, 31,402 shipments, and 32,255,359 pounds of freight between Birmingham and Memphis, and between Birmingham and Nashville. Reliable estimates that its annual net income from the proposed transaction will be in excess of $60,000 a year, that the purchase price to be paid at the closing, after deducting rental and earnest money, will be about $100,000, and that it will be able to pay that amount out of accumulated surplus. In case there is insufficient cash on hand, Reliable asserts that it can arrange a 5-year loan, at interest of not more than 8 percent a year.

Cooper

Under certificates in MC-55899 and subnumbers thereunder, Cooper holds general commodity, regular route authority extending from Columbus, Ga. and Montgomery, Ala., on the north, to Tallahassee and Jacksonville, Fla., on the south, and between southwest Georgia through south Alabama to Mobile, Pensacola, Fla., and New Orleans, La., and irregular route, general commodity authority between Mobile on the one hand, and all points in Alabama on the other. Since July 1, 1969, Cooper has been operating under the control and management of AAA Motor Lines, Inc. (AAA), permanent control having been effected on April

30, 1971.[10] AAA holds general commodity, regular route authority under certificates in MC-97726 and subnumbers thereunder, extending from Andalusia and Dothan through Troy and Montgomery, Ala. to Birmingham. Both Cooper and AAA are distribution carriers and both render extensive intrastate service in Alabama. Cooper and AAA maintain terminals in numerous cities in Alabama, and are equipped to handle less-than-truckload as well as truckload traffic. Since Cooper began operation under the bankrupt's authority, it opened terminals at Decatur and Tuscaloosa. It operates 98 tractors, 208 road trailers, and 41 pickup and delivery trucks.

Cooper's balance sheet, as of November 1971, shows total assets of $2.4 million, current assets of $697,103 and current liabilities of $419,207. In the 11-month period ending November 30, 1971, Cooper's operating revenues were $3,393,613, its operating expenses were $3,649,570, and its net income after taxes was $165,192. During the month of November 1971, while operating under the portion of the bankrupt's authority sought to be acquired, Cooper handled 904 shipments, weighing 372,604 pounds in joint-line service between the gateways of Birmingham and Decatur, on the one hand, and on the other, 19 different points Cooper seeks to acquire. Additionally, during November 1971, Cooper transported 3,751 shipments, weighing 5,752,263 pounds between points in its authority and points Cooper seeks to purchase. While Cooper has actively solicited all the business available under the bankrupt's rights, it admits that numerous A-OK points produce very little traffic. During the 6 months of operations under the

10. To satisfy the Commission's requirement in the control proceeding to eliminate duplicating authorities, Cooper filed an application to acquire the AAA operating rights, and to merge those rights into Cooper's certificates. The Commission approved the transaction by report and order served May 24, 1972, in MC-F-11465.

bankrupt's rights, Cooper estimates that the operations have generated $350,000 addtiional revenue for Cooper, and it anticipates an increase to $500,000 for 1972.

Gordons

Under certificates of MC-11220 and subnumbers thereunder, Gordons holds authority to operate as a common carrier over regular routes between points and places in Illinois, Tennessee, Missouri, Arkansas, Mississippi, Louisiana, Oklahoma, Texas, Indiana, Iowa, Minnesota, Ohio and West Virginia, and irregular route, general commodity authority, to operate between points in Alabama within 65 miles of Birmingham, including Birmingham, on the one hand, and on the other, Louisville, Ky. It maintains terminals in the major cities it is authorized to serve, including Birmingham, and since beginning operations under the bankrupt's authority, it has added terminals at Albertville and Opelika—points within A-OK territory. As of September 1, 1971, Gordons operated 2,462 pieces of equipment, consisting of 346 tractors, 1,066 trailers, and 1,050 city trucks, tractors and trailers.

Gordons' balance sheet, as of December 4, 1971,[11] reflects total assets of $24.5 million, current assets of $9.5 million and current liabilities of $5.9 million. For the period January 1, 1971 to December 4, 1971, Gordons' freight revenue was $45 million and its net income, after taxes, was $1.5 million. It represents that it has sufficient cash on hand to complete the purchase of the bankrupt's rights.

During the period May 17, 1971 to December 2, 1971 Gordons handled 5,056 shipments, weighing 6,375,000 pounds, to the Alabama points of A-OK which it seeks

11. Gordons' accounting is set up on a 13 period basis and December 4, 1971 is the end of the 12th accounting period.

to purchase, and 5,881 shipments, weighing 10,222,000 pounds from such points. During this period, the revenues produced by the operations under temporary authority were $481,762.

M & D

M & D holds regular route authority extending through New York, Pennsylvania, Ohio, Indiana, Illinois, Kentucky, Tennessee, north Alabama, northwest Georgia, North and South Carolina, Virginia, Washington, D.C., Maryland, and Delaware. The southern terminus of M & D's regular route system is Birmingham, from which it renders service between Birmingham and M & D points north of the Alabama-Tennessee State line, including regular service to and from Nashville. M & D maintains 42 terminals in its systems, two of which have been recently opened at Mobile and Montgomery. All of its terminals are equipped to handle truckload and less-than-truckload freight. M & D operates 865 tractors, 1,816 trailers, 302 pick up trucks, and 39 service trucks, maintaining 12 pick up and delivery trucks, two city trailers, four city tractors, and 41 road trailers at Birmingham.

As of October 29, 1971, M & D's balance sheet reflects total assets of $23.7 million, current assets of $7.9 million, and current liabilities of $4.6 million. For the first 10 months of 1971, M & D's operating revenues were $54.1 million, its expenses were $45.2, and its net income, after provision for taxes, was $1.4 million. It estimates that its operations under the bankrupt's rights for a full year would produce revenues of about $1.2 million. It states that it will pay cash for the balance of the purchase price, but if there is insufficient cash on hand at the time of consummation, it can borrow the remainder, and that A-OK's rights will pay for themselves within a few years.

When M & D began operations under A-OK's rights, it stated that it was able to resume its participation in traffic previously handled in conjunction with A-OK. It indicated that it has been rendering a complete truckload and less-than-truckload service to the points in A-OK's authority it seeks to purchase. In the 4-week period ending September 1, 1971, M & D delivered 415 shipments, weighing 774,258 pounds to A-OK points on U.S. Highway 31, and received 634 shipments, weighing about 1 million pounds from A-OK points, all shipments having either originated at or delivered to Mobile, Montgomery or points nearby, and Birmingham.[12]

Supporting Shippers and Carriers

Reliable.—Seventeen shipper and five carrier witnesses presented evidence in support of Reliable's proposed acquisition. The gist of the shipper testimony is that they presently use the service of Reliable primarily for shipments into Birmingham and from Birmingham to and through the Memphis and Nashville gateways. Some have used the combined service of A-OK and Reliable prior to A-OK's bankruptcy, and many used Reliable's service prior to its obtaining temporary authority to operate the A-OK rights. Most of them patronize Reliable frequently—many on a daily or weekly basis. Substantial volumes of their traffic consists of less-than-truckload shipments. In the past, some of the shippers experienced difficulty in reaching Alabama points because many of the larger carriers were not interested in small shipments. Other shippers cited increased production by their companies and carrier equipment problems as reasons underlying the need for additional service by Reliable. Some

12. M & D is willing to have Flomation deleted from its authority as that is a point included in the portion Cooper seeks to purchase.

shippers have a particular need for the services of more than one carrier, especially during peak seasons, because of the particular nature of their loading system or the flow of traffic to a large number of destination points. Many shippers stress the fact that they receive overnight service to Memphis on less-than-truckload shipments, and they all characterize the service of Reliable as dependable, ranging from good to excellent. Although some of the shippers divide their traffic between Reliable and other carriers, including several of the protestants herein, others use the services of Reliable almost exclusively. All of the shippers want the service of Reliable into Birmingham continued, and many foresee an improvement in service if Reliable's application is approved.

Five carriers indicated that they frequently interchange a substantial volume of traffic with Reliable at either Birmingham moving to and through the Memphis or Nashville gateways, or at the latter points on traffic moving to Birmingham and beyond. Because of circuitry, one carrier has no carrier other than Reliable available for the interchange of traffic moving to Birmingham. Other supporting carrier witnesses indicated that while one interchange arrangement is available, they find it highly advantageous to have more than one connecting or backup carrier for interchange. Some of the supporting carriers experienced problems in the past particularly in moving traffic between Birmingham and Nashville, and between Birmingham and Memphis because the movements required three line hauls—a situation which has been changed with the institution of service by Reliable. They find the service of Reliable satisfactory, and are hopeful that its service will be continued.

Cooper.—Nineteen shipper witnesses presented evidence in support of Cooper's proposal. Most of them use

Cooper's service to fulfill their transportation needs and find it to be satisfactory in all respects. Some used the prior service of A-OK but now rely on Cooper's expedited, single-line service. For example, one shipper uses Cooper's service to coordinate a large export movement from Decatur, Ala., to the Port of New Orleans, and to move interplant traffic between Decatur and Pensacola. Another patronizes Cooper for the movement of small less-than-truckload traffic, via the Birmingham gateway, from points in Georgia and Missouri to Linden, Ala. Others have indicated that they would use the services of Cooper if it established terminals at or near their plant sites. Another shipper, which formerly used A-OK from Cullman to the Birmingham gateway, now relies on Cooper's single-line service from Decatur (via Birmingham as a point of joinder) to South Georgia, Jacksonville, and Tallahassee because Cooper's service has been superior to the service of other carriers. Most of the shipper witnesses emphasized the need for expedited, dependable and regular service, and stated that Cooper is providing such service in an area where other carriers had been less than satisfactory. They foresee an improvement in service if Cooper's application is approved.

Gordons.—Eighteen shipper witnesses presented testimony in support of Gordons' acquisition. One shipper used Gordons for numerous shipments in 1971 from A-OK points to Gordons' destinations, and by so doing, was able to obtain single-line service. Another shipper who has several carriers available at its plant site formerly used A-OK to transport less-than-truckload shipments, now uses Gordons for such shipments, and supports Gordons' application primarily because Gordons offers single-line service from its plant to points in the midwest served by Gordons. Many others who had used the combined service of A-OK and Gordons prior to A-OK's bankruptcy now use Gordons

because it provides single-line service to and from A-OK points. Many of these are currently making extensive use of Gordons' service. Some testified that while other motor carrier transportation is available, they have had difficulty in the past because of problems involving prepaid combinations or the reluctance of some carrier to accept small or less-than-truckload shipments. With the inception of operations of A-OK's rights by Gordons, these problems, they assert, have been solved. Practically all of the witnesses testified they presently use Gordons' service to a substantial extent, that the service ranges from good to excellent, and that they desire to have it continued particularly because it provides single-line service on less-than-truckload traffic.

M & D.—Eight shipper witnesses presented testimony in support of M & D's acquisition. Most of these shippers have been using the services of M & D since it commenced operations of A-OK's rights. In support of M & D's proposal, they point to the expeditious, single-line service now being provided by M & D, and the transportation problems they experienced in the past because of the lack of appropriate equipment and the reluctance on the part of some carriers to handle less-than-truckload traffic. For two shippers, M & D is the only carrier now providing direct service from their Ohio plants to such areas as Birmingham, Mobile and Montgomery. Most of the shippers supporting M & D uses its services regularly, citing the need for single-line service as the most important factor for satisfying customer demands. They describe M & D's service as generally excellent and request that it be made permanent.

Protestants' Contentions

As previously indicated, the majority of the protestants are opposed to all four of the proposed acquisitions. In

general, they argue that the proposed split-up of A-OK's authority into four parts would create a complex division of authority and present grave problems of interpretation. Among other things, they contend that if the applications are approved, the motor carrier transportation system in Alabama would be radically changed and the competitive balance in Alabama and other states seriously disturbed. The division of A-OK rights in the manner proposed would, they contend, permit new operations far different from those previously conducted by A-OK, and would therefore be inconsistent with the public interest. They emphasize the fact that the trustee sought no authority from the Bankruptcy Court to continue A-OK's operations, and made no effort to sell the A-OK authority as a single entity. They feel that the A-OK rights should have been sold to one carrier and that had that been done, operations could have been conducted in the manner previously conducted by A-OK.

They assert that the situation is compounded by the peculiar history of the A-OK certificates of registration, pointing out that A-OK acquired certain of the intrastate authority of the Jack Cole Company, that A-OK subsequently registered it under section 206 of the Motor Carrier Act, obtained certificates of registration, and that after the ownership and control of A-OK changed hands on several occasions, the control of A-OK and of the certificates vested in Thornton Cole, son of the owner of the Jack Cole Company and a stockholder of the Jack Cole Company at the time of the transfer of its intrastate authority to A-OK.

More specifically, protestants contend that the proposed transaction would result in an improper division of the A-OK authority, that the section 5 applications cannot be approved by this Commission until the Alabama Public

Service Commission approves the transfer of the corresponding intrastate transactions, that the A-OK rights become dormant at the time of its bankruptcy, that the proposed transactions would result in an entirely new and different service, that Gordons, Cooper and Reliable would immediately convert the irregular route authority they seek to acquire into regular route authority, that the A-OK certificates allegedly held under common control and management (Jack Cole and Thornton Cole) may not be transferred to multi-state carriers, and that in the case of Cooper, which is controlled by AAA, the Commission cannot properly approve its proposal to acquire duplicating operating rights already served by AAA.

Additionally, Birmingham-Nashville, which is opposed only to the application of Reliable, contends that as a result of a decision of the Supreme Court of Alabama, most of the shipments handled by A-OK in conjunction with Reliable were unlawful, that no supporting shipper moving traffic between Nashville and Birmingham had ever used A-OK in combination with Reliable, that approval of the applications will result in duplicating authority for Reliable and duplicating service to some A-OK points. Birmingham-Nashville requests that in the event the application of Reliable is approved, the authority be restricted to preclude Reliable from handling traffic which originates at, or is destined to, or interline at Nashville.

Braswell is concerned primarily with the extension of Gordons' service into Columbus, Ga., explaining that while Gordons does not propose to serve Columbus, its proposed acquisition would permit it to serve Phenix City which is within the commercial zone of Columbus. It also objects to Gordons' proposal to operate between Fairfax, Opelika, Phenix City, and Birmingham. Braswell requests that if Gordons acquires rights between Birmingham

and Phenix City, the authority so acquired be conditioned to expressly exclude Columbus. Finally, Braswell opposes the application of Reliable insofar as it seeks to institute single-line service between Birmingham and Memphis because it (Braswell) has authority to operate between those points.

Protestants' Evidence

Protestants opposing the applications offered evidence to show that their service and revenue would be impaired as the result of the proposed transactions. All of the protesting carriers operate in one or more of the areas involved herein. None considered A-OK a competitive force in the respective territories they served prior to A-OK's bankruptcy. They are apprehensive that the proposed apportionment and acquisition of A-OK's rights by the several vendees would, through the substitution of vendees' strong competition for the weak competition of A-OK, adversely affect their services and revenue. Following is a summary of their evidence.

Bowman.—Bowman operates between points in Alabama and some 17 other states; it has terminals at Anniston, Gadsden, Birmingham, Decatur, Cusetta, Fayetteville, Montgomery and Mobile. During the week May 2, 1971 through May 8, 1971, Bowman handled 1,359 shipments, weighing 1.9 million pounds, producing revenue of $39,000, to or from points Gordons seeks to serve; 520 shipments, weighing 400,000 pounds, producing revenue of $8,000, moving to or from points Reliable seeks to serve; 1,692 shipments, weighing 10 million pounds, producing revenue of $81,000 on traffic moving to or from points Cooper seeks to serve, and 1,286 shipments, weighing 2.3 million pounds, producing revenue of $104,000, moving to or from points M & D seek authority to serve. As in the case of several other protestants, Bowman failed to identify the specific

traffic being or expected to be diverted as a result of the proposed transactions.

Hiller.—Hiller transports general commodities between points in the northwest quadrant of Alabama, its routes extending from Birmingham in a northerly direction through Cullman and Decatur to the Alabama-Tennessee State line and westerly from Birmingham through Tuscaloosa to the Alabama-Mississippi State line. Its terminal points are Jasper, Haleyville, Fayette, Russellville, and Decatur, points proposed to be served by Gordons, and the Sheffield-Tuscumbia area, which is the area proposed to be served by Reliable. On November 3, 1971, Hiller handled 492 shipments out of Birmingham, of which 231 or nearly 50 percent moved to points directly involved in these proceedings. Since the issuance of temporary authority, both Cooper and Reliable have been competing vigorously with Hiller, although A-OK had never offered Hiller any competition. Hiller asserts that traffic which Reliable formerly interchanged with it is now being diverted to Cooper —in one instance even though the shipment was specifically routed for delivery by Hiller. Over the past few years, Hiller's revenues have increased only slightly; it feels that it needs no additional competition from either Cooper or Reliable.

North Alabama.—North Alabama is a small, regular route carrier, holding general commodity authority to operate between Birmingham and points in eastern half of Alabama. It serves several points which Gordons seeks to serve, and one point which Cooper proposes to serve. Most of its terminals are located at points involved in Gordons' application. In the past, North Alabama and Gordons interchanged substantial volumes of traffic, but since Gordons began operating under A-OK rights, Gordons delivers to, and originates traffic at the principal North Ala-

bama service points, thereby decreasing the tonnage heretofrom interchanged between Gordons and North Alabama. North Alabama cited six specific instances in which traffic was diverted from it to Gordons. It objects to the proposals of Gordons and Reliable, stating that Gordons' proposed service would constitute an invasion of its territory and that A-OK was never competitive with North Alabama at any point.

Floyd & Beasley.—Floyd & Beasley holds general commodity authority to several points in Alabama, including Birmingham, Alexander City, Sylacauga and Talladega, and authority to transport textiles and textile products between all points in Alabama, and all points in Georgia, Tennessee, and South Carolina. After Gordons began operating A-OK authority, F & B states that it began to lose interline traffic to Gordons, and to substantiate this claim, it presented data showing the tonnage interchanged between the two carriers during periods before and after Gordons' operations of A-OK's rights. During April 1971, F & B received 79,408 pounds from Gordons and delivered 621,218 pounds to Gordons; in December 1971, F & B received 6,066 pounds from Gordons and delivered to it 170,287 pounds. The explanation for the decline in interchange traffic is attributed to the fact that Gordons is now originating and delivering traffic at points that formerly were served in joint-line service, and F & B states that while A-OK was not competitive with it prior to bankruptcy, the competition of Gordons is strong. It is noted that F & B serves the entire State of Alabama, that Gordons interlines traffic with F & B to and from numerous Alabama points, and that the above data do not show the percentage of traffic that was originated at or destined to points Gordons seeks to purchase. Therefore, it is not shown that F & B's traffic loss is directly related to the proposed transaction.

Bee Line.—Bee Line operates between Birmingham and Chattanooga, serving Albertville, Boaz, Ft. Payne, Guntersville and Scottsboro, points proposed to be served by Gordons. It has terminal points in most of those cities. Bee Line claims that it had formerly handled substantial interline traffic with Gordons and that such traffic is now lost. For example, during May and June 1971, it states that it originated 78 shipments weighing 965,967 at Boaz and Guntersville, but that as soon as Gordons began operating the A-OK rights, it lost all of this traffic.

Neely-Hall.—Neely and Hall are under common control and conduct operations jointly. Neely holds general commodity authority extending from Gadsden, on the north, through Birmingham, Tuscaloosa, Demopolis, and Jackson, and to Mobile, on the south. Hall holds general commodity authority to operate between all points within a 125-mile radius of Birmingham, including Birmingham, on the one hand, and on the other, Mobile, Andalusia, and Dothan, and points within 15 miles thereof. They operate a number of terminals in Alabama and collectively serve most of the points which Cooper proposes to serve. Claiming that the operations of the vendee has had a substantial impact upon their business, these protestants presented the following data showing the traffic that they handled in conjunction with the vendees before and after the grant of temporary authority:

COMPARISON OF TRAFFIC HANDLED IN CONJUNCTION WITH APPLICANTS BEFORE AND AFTER TEMPORARY AUTHORITY

SHIPMENTS RECEIVED FROM RELIABLE

During 1971 prior to June 1—

Total Weight 139,523 lbs.

Total Revenue $2,111.49

After June 1 thru Sept. '71—

Total Weight 302 lbs.

Total Revenue $6.00

SHIPMENTS RECEIVED FROM GORDONS DURING 1971 DESTINED TO INVOLVED POINTS IN ALABAMA

Before opening of terminals by Gordons in Albertville and Opelika—

Total Weight 279,219 lbs.

Total Revenue $3,365.73

After opening of terminals by Gordons in Albertville and Opelika—

Total Weight 292 lbs.

Total Revenue $9.00

SHIPMENTS RECEIVED FROM COOPER FROM JANUARY 1971 THROUGH SEPTEMBER 1971 DESTINED TO INVOLVED POINTS IN ALABAMA

Before June 1, 1971—

Total Weight 153,078 lbs.

Total Revenue $1,698.26

After June 1, 1971 thru Sept. 1971—

Total Weight 39,705 lbs.

Total Revenue $373.64

SHIPMENTS RECEIVED FROM M & D DURING 1971 DESTINED TO INVOLVED POINTS IN ALABAMA

Before June 15, 1971—

Total Weight 620,031 lbs.

Total Revenue $9,745.43

After June 15, 1971—

Total Weight 29,883 lbs.

Total Revenue $553.68

Like most protestants, Neely-Hall had more gross revenue in 1971 than in 1970. Thus, while Neely-Hall sustained traffic losses since the commencement of temporary operations, there is no showing that their revenues have been affected to an appreciable extent.

GFA.—GFA operates between points in Alabama, Georgia, Florida and Mississippi, including authority to operate between Birmingham and Mobile over the same route M & D proposes to acquire, and between Birmingham on the one hand, and on the other, Citronelle, Fairhope, Flomation, Foley, Luverne, Monroeville, and Robertsdale, the area in which Cooper proposes to operate. GFA states that it has lost all of the traffic which it previously handled in conjunction with M & D, indicating that during May 1971, prior to temporary authority, it received 94 shipments from M & D, and only 10 shipments in January and February 1972. Even if this traffic loss is the direct result of the proposed transaction, the revenue loss of some $1,500 a month is but a small percentage of GFA's total revenue of $6.6 million in 1971.

Baggett.—Baggett operates between Birmingham and points within 15 miles thereof, on the one hand, and some 40 points in Alabama, on the other, and also over the same regular route M & D seeks to acquire. Baggett shows the shipments it received at Birmingham either from shippers or connecting lines destined to the Alabama points involved for two different days in 1971. On March 17, 1971, the number of shipments so received by Baggett was 210, while on August 18, 1971, the total was 201. In view of the small amount of traffic available to and from Centre, Baggett

doubts whether it can continue to serve this point if additional competition is authorized.

Birmingham-Nashville Express.—BNE holds authority to transport general commodities between Birmingham and Nashville, serving all intermediate points in Alabama via U.S. Highway 31 and I-65. It opposes Reliable's proposal. BNE submitted evidence covering all traffic which it handled between Birmingham and Nashville for five days during the period March through July 1971. During these five days, BNE handled 1,220 shipments, weighing 1.8 million pounds, and producing revenue to BNE of $21,527. Projecting these data to a full year, BNE would have have handled 63,440 shipments between Birmingham and Nashville, weighing approximately 95 million pounds and producing revenue to BNE of $1,119,528, or 78.8 percent of its total revenue. In view of the fact that Reliable would operate between Birmingham and Nashville, if its application is approved, BNE concludes that all of its traffic moving between Birmingham and Nashville is vulnerable to diversion. Other evidence presented by BNE tended to show it has a higher percentage of overnight deliveries than Reliable and that its service is far superior to that provided by Reliable. For the year 1971, BNE's gross revenues showed an increase of $1.4 million as compared with $1.2 million in 1970. Notwithstanding competition, BNE has shown consistent growth. While all of BNE's traffic between Birmingham and Nashville is susceptible to diversion, it is not realistic for this to actually occur.

Central.—Central holds general commodity authority between Knoxville and Mobile, serving a number of central Alabama points. Among others, Central has a route from Chattanooga westwardly through Huntsville to Florence, and a route from Florence to Cullman and into Birmingham. It interlines at various points such as Chattanooga,

Birmingham and Sheffield, interlining at the latter point with Reliable and Pulashi Highway Express. Central's evidence showed that its interchange with Reliable declined from 169,403 pounds in August 1968, to 34,638 pounds in August 1969, to 2,145 pounds in August 1970. In October 1971, after Reliable began operating into Birmingham, the interline traffic delivered to Central by Reliable amounted to 2,760 pounds.

Central stated that it felt the competitive impact of Cooper's and M & D's operations, although its revenues for the last six months of 1971 were greater than in the corresponding period of 1970. Central's traffic studies indicate that there is very little interchange business with either Cooper or M & D at either Mobile or Birmingham, that the volume of interchange business at both points tends to change from month to month, and that interline business between Central and these carriers increased since the commenced operations over A-OK's rights. In answer to questions by the presiding officer, Central was unable to identify specific traffic it lost to vendees.

Braswell.—Braswell, a long-haul carrier, operating in the far west, midwest, and southern states, has authority to operate between Birmingham and Memphis, the area involved in Reliable's application, and is also authorized to serve such points as Opelika, Fairfax, Phenix City and Tuskegee, which are points involved in Gordons' application. Braswell's evidence deals with the potential diversion of traffic by Gordons at Phenix City. During 1971, Braswell's operating revenue was $17 million as compared to $14.7 for 1970, and from this, it does not appear that its operations or revenues have been endangered by the vendees' operations. Additional discussion concerning protestants' evidence in regard to traffic diversion appears elsewhere in this report.

Applicants' Contentions

The trustee contends that the public interest here encompasses more than the interests of the shipping and receiving public and should include consideration for some 300 creditors of the bankrupt.[13] He maintains that any possible detriment to the protestants would be minimal as compared to the detriment to the public that would result from the denial of the applications. Arguing that the proposed division of A-OK's operating rights are both reasonable and feasible, he contends that the involved rights are so extensive that no single carrier could propose a realistic plan to render comprehensive service to and from all of the authorized points. In explanation of why the particular vendees were selected as the successful bidders, the trustee pointed out that the aggregate purchase price was adequate, that all the carriers in the group, except Reliable, presently operate into Birmingham, and that Reliable's entrance into Birmingham would have less competitive impact than a similar proposal by a major long-haul carrier. Moreover, Reliable was one of the primary interline carriers that had previously done business with A-OK. As to the purchase price of the various proposals, the trustee contends that the price is reasonable, having been arrived at by arm's length bargaining that included a combination of sealed bids, public auction, and private negotiations.

In general the motor carrier applicants present similar arguments on the major issues, each contending that its proposed transaction will be consistent with the public interest. They contend that prior to A-OK's bankruptcy, it performed substantial motor carrier operations throughout

13. Creditors include the federal, state and local governments as well as financial institutions, individuals, and various businesses. Approval of the applications will provide sufficient funds to pay the secured creditors with some distribution to unsecured creditors.

most of the territory it was authorized to serve, that A-OK had an established interline business with one or more vendee and with other carriers, that the temporary cessation of A-OK's operations as a result of bankruptcy is insufficient to establish dormancy or otherwise bar approval of the transactions, that the purchase price is reasonable and can be amortized within a short period of time, that evidence of A-OK's past operations and of supporting witnesses establishes that continuation of the proposed service is needed, that no new service will be instituted in the involved areas, but that the proposed transactions will merely enable the vendees to perform single-line service in lieu of joint-line service previously performed to and from A-OK's authorized points, that none of the protestants showed any injury or threatened injury as a result of the proposed transactions, that many of the protestants have, in fact, benefited by the temporary operations of A-OK's rights, that the proposed division of A-OK's irregular route authority among the vendees is appropriate and presents no bar to approval of the transactions. Arguing that the proposed transactions will result in improved service, they emphasize such factors as overnight delivery service, shorter mileage, and single-line service.

With specific reference to potential injury to competing carriers, applicants point out that several protestants have increased their gross revenues and generally prospered during 1971, the year in which all four applicants operated A-OK's rights for some seven months. The fact of their prosperity, it is argued, despite increased competition from the vendees' service under A-OK's rights, refutes the claim of protestants that the proposed transactions, if consummated, will have an adverse effect upon their service or revenues. All of them contend that there is no basis for deferring action on the section 5 application until such time as the Alabama Public Service Commis-

sion approves the transfer to the vendees of A-OK's intrastate rights.

Statutory Criteria

The proposed acquisitions of the vendor's operating authority by the vendees are governed by section 5 of the Act, and their conversion applications by section 207. Under section 5(2)(b) of the Act, the applicants are entitled to an order approving their proposals, if subject to such terms, conditions and modifications as are found to be just and reasonable, the proposals are within the scope of 5(2)(a) and will be consistent with the public interest. In determining whether any section 5 application meets the public interest test, section 5(c) prescribes specific statutory criteria, which include, among other things, the effect of the proposed transaction upon the adequacy of transportation service to the public. In addition to the statutory criteria, other criteria have been developed and recognized by the courts and by this Commission in determining the public interest. Implicit in these criteria is the responsibility to evaluate the anti-competitive impact of the proposals upon competing carriers, and to preserve a structurally adequate balance of transportation service. Whether a proposed transaction is in the public interest is to be determined in the light of the national transportation policy among the objectives of which is the development of a more efficient transportation system. As was stated by the Supreme Court, the term "public interest" is not a concept without ascertainable criteria but has a direct relation to the adequacy of our transportation system, to its essential conditions of economy and efficiency and to appropriate provisions and best use of transportation facilities. *New York Central Securities Co.* v. *United States,* 287 U.S. 12, 25. The phrase "consistent with the public interest" means the same as compatible with the public

interest or not contradictory or hostile to the public interest. See *In Re Chicago, R. I. & P. Ry. Co.,* 168 F.(2d) 587 (7th Cir.); *Scott Bros., Inc. Collection and Delivery Service,* 2 M.C.C. 155, 164; *Merchant's Dispatch, Inc.—Purchase—Smathers,* 25 M.C.C. 407, 409; *Chesapeake & O. R. Co.—Control—Baltimore & O. R. Co.,* 317 I.C.C. 261, 285; *Pacific Power and Light Co.* v. *Federal Power Comm.,* 111 F.(2d) 1014, 1016 (9th Cir.); *Ill. Cent. Gulf R. Acquisition—G. M. & O., Et Al.,* 338 I.C.C. 805, 874. In *Pacific Power, supra,* at 1016, the court said that the "phrase 'consistent with the public interest' does not connote a public benefit to be derived or suggest the idea of a promotion of public interest." Instead, the "thought conveyed is merely one of compatibility." Section 207 provides, among other things, that as a requisite to the issuance of a certificate, the proposed service is or will be required by the present or future public convenience and necessity.

Discussion and Conclusions

A threshold consideration here involves protestants' contention that disposition of the applications herein must be postponed until a decision is reached by the Alabama Public Service Commission with respect to vendees' proposed purchase of vendor's intrastate rights. It is to be noted that whenever a section 5 transaction is appropriately before the Commission, its jurisdiction over the matter is exclusive and plenary. See *Eagle Motor Lines, Inc.—Pur. —Victory Frt. Lines, Inc.,* 101 M.C.C. 368, 372, affirmed *Eagle Motor Lines, Inc.* v. *United States,* 271 F. Supp. 594, 596; *T.I.M.E. Freight, Inc. Merger,* 97 M.C.C. 310. Furthermore, section 5 contains specific language which requires the Commission to enter an order approving a proposed transaction if it is found to be consistent with the public interest. Thus, while an order entered under section 5 is permissive, the entry of the order itself is mandatory pro-

vided the proposal thereunder meets the public interest test. In *Schwabacher* v. *U. S.*, 334 U.S. 182, 198, the Supreme Court stated that as to "matters within its scope" the Interstate Commerce Act "is the supreme law of the land." Since the proposed acquisitions are matters clearly within the scope of section 5, the Commission has power to dispose of them without awaiting the decision of the Alabama Commission.

Contrary to protestants' contentions, it appears that there is no serious question of dormancy in these proceedings. Prior to A-OK's bankruptcy, it conducted extensive operations throughout most of its authorized territory. Its participation in joint-line operations with the vendees and other carriers clearly establishes substantial performance of operations as a common carrier in interstate commerce. Its operating revenues, although declining from $1.3 million in 1968 to $.6 million for 6 months in 1970, supports this conclusion. Most of the protestants, however, contend that during the last 7 months of A-OK's operations, there were numerous points within its territory that it did not serve. Notwithstanding this contention and the evidence in support thereof, the conclusion is warranted that in consideration of the nature of the authority involved, A-OK's financial difficulties, its managerial problems, and the fact that many of the points within its territory were small, rural communities, A-OK did, in fact, conduct operations to and from a representative number of points in Alabama prior to bankruptcy, and rendered active and continuous service in the transportation of a substantial volume of interstate traffic. At all times prior to bankruptcy, A-OK held itself out to serve the public, vigorously solicited traffic, accepted all traffic offered, and at no time prior to ceasing operations, did it reject any traffic it was authorized to handle.

To meet the test of substantiality enunciated in *New Dixie Lines, Inc.—Control—Jocie Motor Lines, Inc.*, 75 M.C.C. 659, a carrier is not required to submit evidence of service to and from all authorized points in its area of service or to show that a regular and consistent service has been performed. See *Mid-American Lines—Purchase—Five J Motor Service*, 109 M.C.C. 753. Moreover, the fact that A-OK had not been competitive with protestants, or had only a small amount of interline business with some of vendees, does not detract from the viability of its operations. It is concluded that A-OK conducted operations commensurate with its physical and financial resources, and met the test of substantiality during the period prior to bankruptcy.

Protestants' objection to proof of A-OK's past operations by freight bills instead of delivery receipts lacks merit. As explained by the trustee, delivery receipts were not available for this purpose. Moreover, freight bills represent original records of the carrier, maintained in the ordinary course of business, were the best evidence available, and as such, are reliable and competent proof under the circumstances here presented. The legality of certain cross-haul operations conducted by A-OK is not in issue here since it had performed extensive service in the transportation of interstate traffic without regard to such operations.[14]

---

14. The Alabama Public Service Commission held that certain of A-OK operations, designated as cross-hauls, were illegal. The Circuit Court of Covington County reversed the Commission, and the Supreme Court of Alabama on April 9, 1970 reversed the Circuit Court, thereby sustaining the Alabama Commission. *Alabama Public Service Com'n* v. *A-OK Motor Lines, Inc.*, 249 So. 2d 838. The Alabama Supreme Court denied a petition for rehearing on June 17, 1971. It is not necessary to question the holding of the Alabama Commission for there is sufficient evidence of legal operations by A-OK to establish its viability.

The facts and circumstances surrounding the cessation of operations by A-OK in mid-October 1970 and its subsequent bankrupt status in November 1970, do not establish dormancy or otherwise bar approval of the transactions. During 1970, A-OK was obviously experiencing financial difficulties, but despite this, the new owner expanded its facilities, increased its volume of business, and made an effort to continue operations. Finally when operations ceased, A-OK was forced into bankruptcy, and because of lack of operating capital, the trustee made no attempt to resume operations. However, under the supervision of the Bankruptcy Court, the trustee took immediate steps to sell A-OK's operating authority, preserve and marshal its assets, collect accounts receivable, settle claims, and dispose of its tangible property. As indicated, operations under A-OK's authority resumed in May 1971, about 7 months after the cessation of operations. As the court stated in *Arrow Transportation Co.* v. *United States*, 300 F. Supp. 813, 817, "dormancy has never been applied to a temp ary cessation of operations alone." Here the cessation of operations was temporary and the resumption thereof was initiated as soon as practicable. Under the circumstances, it would be unreasonable to conclude that the relatively short period during which the operation of A-OK's authority was temporarily suspended supports a finding of dormancy. The trustee acted as expeditiously as possible in finding prospective purchasers and carriers willing to operate A-OK's authority. All circumstances considered, it is of no significance that the trustee did not affirmatively seek authority of the Bankruptcy Court to resume operations, for this would have been an economic impossibility, or at least highly impracticable. The conclusion is therefore warranted that the temporary cessation of operations of A-OK's rights in November 1970, does not establish dormancy or otherwise bar approval of the proposed transactions. See

Mid-Continent Frt. Lines, Inc.—Purchase—Hanson M. Exp., 65 M.C.C. 312; *West Farms Express, Inc.—Purchase—Anello, Inc.*, 109 M.C.C. 826;[15] and *Arrow Transportation Co.* v. *United States, supra.*

As to the issue of traffic diversion, protestants failed to show that they would be materially affected as a result of the proposed transactions. Their evidence was not specific enough to provide a basis for drawing meaningful conclusions. Except for providing facts as to their authority, equipment, terminals, schedules, and revenues, their data consisted largely of unsupported predictions as to possible traffic loss and the effect upon them of new competition. Most of the protestants' data are defective in that they failed to make comparisons with respect to traffic handled before and after the vendees commenced operating A-OK's rights. With the benefit of actual experience under the vendees' temporary operations, protestants had ample opportunity to present concrete evidence of actual or potential traffic loss but most of them failed in this respect. Only a few of the protestants showed actual losses and these were insubstantial. Others though showing traffic losses during the relevant periods failed to relate such losses to the operations or proposed operations of the vendees. For the most part, protestants' evidence showed that their business and revenues increased after the commencement of temporary operations by the vendees, and the record clearly demonstrates that protestants' overall stability and financial status are sufficient to enable them to offset the additional competition that may result from the proposed transactions. In similar proceedings under section 5, the Commission has pointed out that the diversion of traffic in the volume predicted, rarely, if ever, occurs.

---

15. *Gregg Cartage Co.* v. *U. S.*, 316 U.S. 74, cited by protestants, dealt with a provision under the so-called grandfather clause, and is not controlling here.

See *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261, 282. The analysis of the evidence here leads to the conclusion that the volume of traffic to be lost by protestants as a result of the proposed transactions will be relatively moderate and will not seriously affect their operations, service or revenues.

The proposed split of irregular route authority among the vendees does not bar approval of the acquisitions. That irregular route authority may be split is well established. See *Borush Motor Exp., Inc.—Purchase—John Vogel, Inc.*, 50 M.C.C. 408; *Jack Cole Co., Inc.—Purchase—Floyd & Beasley Transfer*, 70 M.C.C. 97. In *Merchants Motor Freight, Inc.—Purchase—Bridgeways, Inc.*, 60 M.C.C. 229, 277, in which a division of the bankrupt's authority among several vendees was approved, the Commission observed that:

> Each proceeding involving a division of a vendor's motor carrier operating rights . . . must be considered in the light of all the evidence of record and may not properly be disapproved merely because of the method and scope of the division.

Those remarks are equally applicable to the present situation. Here the hub of the operations is Birmingham, and not more than one vendee would be authorized to operate between Birmingham and any of the points within A-OK's territory.[16] Taking into account the fact that A-OK's authorized points extend from Birmingham in almost every direction, it would have been impracticable, if not impossible, to divide the irregular route authority on

16. M & D's proposed acquisition over regular routes, and Cooper's acquisition over irregular routes would duplicate to the extent that they would both be authorized to operate between Birmingham and Flomation. M & D is willing to surrender its right to serve Flomation as an intermediate point to avoid duplication.

specific geographic lines; the proposed split is both orderly and practical, extending and complementing the existing operations of the vendees, and providing an opportunity for the performance by the vendees of more efficient transport service to and from the important industrial centers of Alabama, as well as the smaller communities.

We disagree with protestants' contention that a new service will result from the proposed acquisitions, thereby creating a competitive imbalance in the motor carrier transportation system in Alabama. In the case of Reliable, the acquisition would result in the substitution of it for the joint-line operations previously conducted by A-OK and Reliable. The acquisition of Cooper and Gordons would extend their operations which they now conduct in various sectors of Alabama, while M & D's acquisition would merely extend its operations from Birmingham southwardly to Montgomery and Mobile. As indicated, all of the proposed acquisitions are complementary to the existing operations of the vendees, and constitute normal extensions of authority resulting from section 5 acquisitions. While protestants—at least some of them—will undoubtedly feel the competitive impact of the proposed transactions, this is merely a normal result of every section 5 transaction. In a situation such as here presented, protesting carriers cannot realistically expect to be protected against any and every increase in competition. In this case, however, we are of the opinion that the anti-competive impact upon competing carriers will not be serious. The fact that the operations of the vendor may not have been competitive with the protestants does not necessarily require disapproval of the proposed transactions if other factors show that they are consistent with the public interest. See *B & P Motor Exp., Inc.—Pur.—The Cleveland Cartage Co.*, 101 M.C.C. 469, 476. The readjustments to be made in the competitive relations of the protestants are relatively minor, and in our

opinion, considering their financial stability, the broad scope of their operations, and their overall competitive strength, they will be more than able to make the adjustments and meet the increased competition without undue injury to their operations and revenues.

The status of Thornton Cole as owner of the A-OK stock has little or no bearing on these transactions. Through Wheels, Inc., Thornton Cole took control of A-OK in January 1970, at the insistence of a local bank, and was given the A-OK stock for the sum of one dollar. The transfer of authority from the Jack Cole Company to A-OK was completed years ago, and there is nothing in the record to support the finding that the rights of A-OK were ever held under common control and management by reason of Thornton Cole's relationship to either carrier. In any event, Thornton Cole does not presently control or have the power to control A-OK. Shortly after A-OK was adjudged bankrupt, and the trustee's appointment approved, control of A-OK shifted from Thorton Cole to the trustee in bankruptcy, and at the time the proposed transactions were agreed upon, control of A-OK and of its rights was vested in the trustee and not in Thornton Cole. As a stockholder, Mr. Cole stands to gain little or nothing from the proceeds of the sale of A-OK's rights. Protestants' arguments on this issue—whether directed at common control, trafficking in, or manufacturing rights—have little or no merit.

We have examined the entire record, in the light of the pertinent statutory criteria, and conclude that the proposed acquisitions are transactions within the scope of section 5(2)(a), and as modified, will be consistent with the public interest. In reaching this conclusion, we have weighed the advantages to the public of the acquisitions against any injury, actual or potential, including the com-

petitive impact of the acquisitions upon the protestants and their potential traffic losses. While some adverse effect in the form of traffic diversion may be sustained by protestants, the record clearly establishes that the advantages to the public will far outweigh the potential disadvantages. Also, we have given weight to the traffic needs in the territory, the interest of creditors of the vendor, and the improved service that is expected to result from the various acquisitions. Among other things, improved service includes matters such as greater flexibility for shippers with respect to the handling of less-than-truckload shipments, increased efficiency of operations, availability of more equipment to fulfill seasonal shipping requirements, the elimination of interchanges eand consequent reduction of delays in transit. Many of the witnesses who testified as to improved service indicated that their transportation problems would be solved or at least minimized if the proposed transactions are consummated. While the shipper testimony was presented in support of the conversion applications, the proceedings were heard on a consolidated record, and there appears to be no reason why weight may not be given to their evidence in determining the public interest issue. See *Seaboard Air Line R. Co.—Merger—Atlanta Coast Line*, 320 I.C.C. 122, 162.

The purchase price and other terms of the proposed acquisitions are just and reasonable, and the vendees are financially able to consummate the transactions without unduly burdening their resources. Most of the vendees will be able to pay the balance of the purchase price out of available funds, and any increase in fixed charges that may result will be minimal and will not jeopardize the rights of the respective vendees or impose a financial burden upon any vendee. No employee of the vendor would be adversely affected as a result of the proposed transaction. It is therefore found that the proposed transactions

meet the applicable criteria prescribed by section 5, that they generally conform with the purposes and objectives of the National Transportation Policy, and will therefore be consistent with the public interest. It is also concluded that a decision approving the proposed transactions is not a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act.

It is well established that evidence of past continued operations under a certificate of registration supports a finding of public convenience and necessity, and will warrant a grant of authority under section 207 substantially identical to that previously authorized under the vendor's certificate of registration. See *Dorn's Transp., Inc.—Purchase—Zaffis*, 101 M.C.C. 508; *O'Donnell's Express—Purchase—Bill's City Transfer, Inc.*, 104 M.C.C. 161, and *Arrow Motor Transit, Inc.—Control*, 104 M.C.C. 436. Here the past continuous service of the vendor has been substantial. Such past service is evidence in and of itself of public need for its continuance in a situation, where as here, the section 5 applications are found to be consistent with the public interest. Additionally, as outlined above, the testimony of numerous shipper witnesses supports the conclusion that the proposals of the vendees will be responsive to a public need. By using the services of the vendees, many of the shippers have solved their past transport problems and they foresee increased efficiency in the future. Most of the shippers are desirous of having vendees' service continued because in most instances, vendees' operations would result in improved service. The fact that a short period of time elapsed between the cessation of operations by the vendor immediately prior to its bankruptcy and the resumption of operations by the vendees under temporary authority does not negate a finding of public need for the vendees' proposed operations, because as indicated, the

temporary interruption in service does not constitute dormancy. It is therefore concluded that the vendees have sustained their burden of proof with respect to the issuance of certificates of public convenience and necessity.

The grant of the certificates of public convenience and necessity, as herein proposed, will be conditioned upon consummation of the purchase of the certificates of registration herein authorized and the surrender of those certificates for cancellation concurrently with the issuance of the certificates of public convenience and necessity. To avoid duplication, M & D's authority will be conditioned upon the deletion of Flomation therefrom as that point is included in the portion Cooper seeks to purchase. In the case of Gordons, its certificate should be restricted against service to and from Columbus, Ga., so as to avoid expansion of the points it will be authorized to serve. There is no justification in BNE's request for restricting Reliable's authority so as to preclude it from handling traffic originating at, or destined to, or interlined at Nashville, because to grant this request would defeat the objectives of Reliable's acquisition. In the event that any duplications result from the proposed transactions, such duplications will be eliminated, and the authority granted herein and that presently held by the vendees to the extent that they duplicate shall not be construed as conferring more than a single operating right. It does not appear advisable or necessary to restrict the authority so as to exclude police jurisdiction from any of the points authorized to be acquired herein. The concept of police jurisdiction, as a device for measuring, limiting or expanding operating authority, is not generally recognized by this Commission in the issuance of certificates of public convenience and necessity, and its introduction here would present problems of interpretation of a local nature, and conflict with prior interpretations of this Commission.

Arguments and contentions not specifically discussed herein have been considered and found to be without merit.

ULTIMATE FINDINGS AND ORDER

Upon consideration of all evidence of record, the Administrative Law Judge finds:

In No. MC-F-11133, that the purchase by Reliable Truck Lines, Inc. of a portion of the operating rights of A-OK Motor Lines, Inc., contained in its certificate of registration No. MC-121218 (Sub-No. 1), and the acquisition of control of said operating rights by Garland Parsley, upon the terms and conditions set forth, which terms and conditions are found to be just and reasonable, constitutes a transaction within the scope of section 5(2)(a) of the Act and will be consistent with the public interest; *provided however,* that Reliable Truck Lines, Inc. shall, prior to or concurrently with consummation of the transaction, furnish the Commission a certified copy of the state certificate as reissued to it, or if the Alabama Public Service Commission does not reissue the certificate, a certified copy of the order which approves the transfer of the intrastate certificate, with a statement in writing confirming the date of consummation of the intrastate transaction. If the transaction herein authorized is consummated, operation under the portion of the purchased certificate of registration is conditioned upon the issuance of a certificate of public convenience and necessity in No. MC-128944 (Sub-No. 9) and is limited to the service therein specified.

In No. MC-128944 (Sub-No. 9) (as a matter directly related to the transaction authorized in No. MC-F-11133) that, contingent upon consummation of that purchase transaction, the present and future public convenience and necessity require operation by Reliable Truck Lines, Inc. in

interstate or foreign commerce as a common carrier by motor vehicle of:

> General Commodities (except those of unusual value, household goods as defined by the Commission, commodities in bulk, Classes A and B explosives, and commodities requiring special equipment):
>
> Between Birmingham, Ala., and points within 15 miles thereof, on the one hand, and on the other, Tuscumbia and Sheffield, Ala.;

that Reliable Truck Lines, Inc. is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations of the Commission thereunder; and that a certificate of public convenience and necessity authorizing such operations should be granted, and the application in all other respects denied; provided however, that the certificate of registration No. MC-121218 (Sub-No. 1) be surrendered with a request for its cancellation concurrently with the issuance of the certificate of public convenience and necessity as herein proposed.

In No. MC-F-11134, that the purchase by Cooper Transfer Co., Inc. of portions of the operating rights of A-OK Motor Lines, Inc., contained in its certificates of registration No. MC-121218 (Sub-Nos. 1 and 2) and terminal property at Decatur, Ala., and the acquisition of control of said operating rights and property by AAA Motor Lines, Inc., and John H. Dove, upon the terms and conditions set forth, which terms and conditions are found to be just and reasonable, constitutes a transaction within the scope of section 5(2)(a) of the Act and will be consistent with the public interest; *provided however,* that Cooper Transfer Co., Inc. shall, prior to or concurrently with consummation of the transaction, furnish the Commission a certified copy of

the state certificates as reissued to it, or if the Alabama Public Service Commission does not reissue a certificate, a certified copy of the order which approves the transfer of the intrastate certificates, with a statement in writing confirming the date of consummation of the intrastate transaction. If the transaction herein authorized is consummated, operation under the portions of the purchased certificates of registration is conditioned upon the issuance of a certificate of public convenience and necessity in No. MC-55889 (Sub-No. 39) and is limited to the service therein specified.

In No. MC-55889 (Sub-No. 39) (as a matter directly related to the transaction authorized in MC-F-11134) that, contingent upon consummation of that purchase transaction, the present and future public convenience and necessity require operation by Cooper Transfer Co., Inc. in interstate or foreign commerce as a common carrier by motor vehicle of:

(1) *General commodities* (except those of unusual value, household goods as defined by the Commission, commodities in bulk, Classes A and B explosives and commodities requiring special equipment):

(a) Between Montgomery and Opp, Ala., over U.S. Highway 331, serving no intermediate points, and

(b) Between Birmingham, Ala., and points within 15 miles thereof, on the one hand, and on the other, Andalusia, Athens, Auburn, Brundidge, Citronelle, Clayton, Cullman, Decatur, Demopolis, Dothan, Elba, Enterprise, Eufaula, Eutaw, Fairhope, Fayette, Flomation, Florala, Foley, Greensboro, Haleyville, Hartselle, Headland, Huntsville, Jasper, Linden, Luverne, Monroeville, Opp, Ozark, Robertsdale, Russellville, Samson, Stevenson, Troy, Tuscaloosa, Union Springs, and Uniontown, Ala.

(2) *Explosives*:

(a) Between the U.S. Ordnance Depot located at or near Bynum, Ala., and Camp Rucker, Ala., from Bynum over U.S. Highway 78 to Anniston and Oxford, thence to the junction of Alabama Highway 37 to Opelika, thence over U.S. Highway 29 to Banks, thence over U.S. Highway 231 to Ozark, thence over Alabama Highway 85 to Camp Rucker and return over the same routes, serving no intermediate points;

that Cooper Transfer Co., Inc. is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations of the Commission thereunder; and that a certificate of public convenience and necessity authorizing such operation should be granted, and the application in all other respects denied; *provided however,* that the certificates of registration No. MC-121218 (Sub-Nos. 1 and 2) be surrendered with a request for cancellation concurrently with the issuance of the certificate of public convenience and necessity as herein proposed.

In No. MC-F-11143, that the purchase by Gordons Transports, Inc. of a portion of the operating rights of A-OK Motor Lines, Inc., contained in its certificate of registration No. MC-121218 (Sub-No. 1) and the acquisition of control of said operating rights by M. M. Gordon, A. W. Gordon, Jr., J. K. Gordon, Esther G. Cato, and Mary G. Conaway, upon the terms and conditions set forth, which terms and conditions are found to be just and reasonable, constitutes a transaction within the scope of section 5(2)(a) of the Act and will be consistent with the public interest; *provided however,* that Gordons Transports, Inc. shall, prior to or concurrently with consummation of the transaction, furnish the Commission a certified copy of the state

certificate as reissued to it, or if the Alabama Public Service Commission does not reissue the certificate, a certified copy of the order which approves the transfer of the intrastate certificate, with a statement in writing confirming the date of consummation of the intrastate transaction. If the transaction herein authorized is consummated, operation under the portion of the purchased certificate of registration is conditioned upon the issuance of a certificate of public convenience and necessity in No. MC-11220 (Sub-No. 123) and is limited to the service therein specified.

In No. MC-11220 (Sub-No. 123) (as a matter directly related to the transaction authorized in MC-F-11143) that, contingent upon that purchase transaction, the present and future public convenience and necessity require operation by Gordons Transports, Inc., in interstate or foreign commerce by motor vehicle of:

> *General commodities* (except those of unusual value, household goods as defined by the Commission, commodities in bulk, Classes A and B explosives and commodities requiring special equipment):
>
> Between Birmingham, Ala., and points within 15 miles thereof, on the one hand, and, on the other, Albertville, Alexander City, Boaz, Centre, Fairfax, Ft. Payne, Guntersville, Oneonta, Opelika, Phenix City, Scottsboro, Sylacauga, Talladega, Tuskegee and Wetumpka, Ala.;

that Gordons Transports, Inc. is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations of the Commission thereunder, and that a certificate of public convenience and necessity authorizing such operation should be granted, and the application in all other respects denied; *provided however*, that the certificate of registration No. MC-121218 (Sub-No. 1) be surrendered with a request for its cancellation concurrently with the issuance of the certificate of public convenience and necessity as herein proposed.

In No. MC-F-11150, that the purchase by the Mason and Dixon Lines, Inc. of a portion of the operating rights of A-OK Motor Lines, Inc., contained in its certificate of registration No. MC-121218 (Sub-No. 1), and the acquisition of control of said operating rights by E. William King, Margaret K. Norris, and John R. King, upon the terms and conditions set forth, which terms and conditions are found to be just and reasonable, constitutes a transaction within the scope of section 5(2)(a) of the Act and will be consistent with the public interest; *provided however*, that Mason and Dixon Lines, Inc. shall, prior to or concurrently with consummation of the transaction, furnish the Commission a certified copy of the state certificate as reissued to it, or if the Alabama Public Service Commission does not reissue the certificate, a certified copy of the order which approves the transfer of the state certificate with a statement in writing confirming the date of consummation of the intrastate transaction. If the transaction herein authorized is consummated, operation under the portion of the purchased certificate of registration is conditioned upon the issuance of a certificate of public convenience and necessity in No. MC-59583 (Sub-No. 130) and is limited to the service therein specified.

In No. MC-59583 (Sub-No. 130) (as a matter directly related to the transaction authorized in No. MC-F-11150) that contingent upon that purchase transaction, the present and future public convenience and necessity require operation by Mason and Dixon Lines, Inc. in interstate or foreign commerce by motor vehicle of:

General commodities (except those of unusual value, household goods as defined by the Commission, commodities in bulk, Classes A and B explosives and commodities requiring special equipment):

Between Birmingham, Ala., and points within 15 miles thereof, and Mobile, Ala., and points within 10 miles thereof, over U.S. Highway 31, serving all intermediate points and the off-route points of Kilby, Prattville, and Saluria, Ala.;

that Mason and Dixon Lines, Inc. is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations of the Commission thereunder, and that a certificate of public convenience and necessity authorizing such operation should be granted, and the application in all other respects denied; *provided however*, that the certificate of registration No. MC-121218 (Sub-No. 1) be surrendered with a request for its cancellation concurrently with the issuance of the certificate of public convenience and necessity as here proposed.

Premises considered it is the order of the Administrative Law Judge that:

In the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from date of service thereof;*

*Any operation to be authorized by the recommended order herein, if it becomes effective, may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicants have complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

In No. MC-F-11133, the purchase by Reliable Truck Lines, Inc. of a portion of the operating rights of A-OK Motor Lines, Inc. represented by its certificate of registration No. MC-121218 (Sub-No. 1), as described in the findings herein, and the acquisition of control of said operating rights by Garland Parsley through the transaction, be and they are hereby approved and authorized subject to the terms and conditions herein set forth.

In No. MC-F-11134, the purchase by Cooper Transfer Co., Inc. of portions of the operating rights of A-OK Motor Lines, Inc. represented by its certificates of registration No. MC-121218 (Sub-Nos. 1 and 2) and certain property, as described in the findings herein, and the acquisition of control of said operating rights and property by AAA Motor Lines, Inc. and John H. Dove through the transaction, be and they are hereby approved subject to the terms and conditions herein set forth.

In No. MC-F-11143, the purchase by Gordons Transports, Inc. of a portion of the operating rights of A-OK Motor Lines, Inc. represented by its certificate of registration No. MC-121218 (Sub-No. 1), as described in the findings herein, and the acquisition of control of said operating rights by M. M. Gordon, A. W. Gordon, Jr., J. K. Gordon, Esther G. Cato, and Mary G. Conaway through the transaction, be and they are hereby approved and authorized subject to the terms and conditions herein set forth.

In No. MC-F-11150, the purchase by the Mason and Dixon Lines, Inc. of a portion of the operating rights of A-OK Motor Lines, Inc. represented by its certificate of registration No. MC-121218 (Sub-No. 1), as described in the findings herein, and the acquisition of control of said operating rights by E. William King, Margaret K. Norris, and John R. King through the transaction, be and they are hereby approved and authorized subject to the terms and conditions herein set forth.

In No. MC-128944 (Sub-No. 9), No. MC-55889 (Sub-No. 39), No. MC-11220 (Sub-No. 123), and No. MC-59583 (Sub-No. 130), contingent upon consummation of transactions authorized in No. MC-F-11133, No. MC-F-11134, No. MC-F-11143, and No. MC-F-11150, and upon compliance by the respective applicants with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act, and the rules and regulations of the Commission thereunder, certificates of public convenience and necessity be issued to Reliable Truck Lines, Inc., Cooper Transfer Co., Inc., Gordons Transports, Inc., and Mason and Dixon Lines, Inc., respectively, authorizing operation in interstate or foreign commerce as common carriers by motor vehicle of the commodities described and in the manner set forth in the findings of this report, subject to the terms and conditions prescribed, and that in all other respects the applications be and they are hereby denied.

The authority herein granted shall not be exercised prior to the date of service of a notice or order stating that this recommended order has become the order of the Commission.

Unless the authority herein granted is exercised within 90 days from the date of such notice or order, this order shall be of no further force or effect.

If the parties to the transactions herein authorized desire to consummate the same, they shall (1) promptly take such steps as will insure compliance with sections 215, 217, and 221(c) of the Interstate Commerce Act, and the rules, regulations and requirements prescribed thereunder, and (2) confirm in writing to the Commission immediately after consummation the date upon which consummation has actually taken place.

If the authority herein granted is exercised, Reliable Truck Lines, Inc., Cooper Transfer Co., Inc., Gordons

Transports, Inc., and Mason and Dixon Lines, Inc., respectively, shall submit for consideration sworn statements and one copy thereof within 60 days after the consummation of the respective purchase transactions showing all of their respective expenditures made in connection therewith, including the legal and other fees, commissions, and other costs incidental to the transaction, the assets acquired and liabilities assumed, including loans incurred, if any, to consummate the transaction, indicating the account number and title to which each item has been or is to be debited or credited.

Effective with the consummation of the transaction herein authorized or 90 days from the date of service of said notice or order that this recommended order has become the order of the Commission, whichever occurs first, the authority granted by orders dated April 28, 1971, in No. MC-F-11133, and May 4, 1971, in No. MC-F-11134, No. MC-F-11143, and No. MC-F-11150, as extended by orders of September 15, 1971, authorizing Reliable Truck Lines, Inc., Cooper Transfer Co., Inc., Gordons Transports, Inc., and Mason and Dixon, Inc., respectively, to lease temporarily certain portions of the operating rights of A-OK Motor Lines, Inc., shall be of no further force and effect.

The recital herein of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

By the Commission, William J. Gibbons, Administrative Law Judge.

Dated at Washington, D. C., this 10th day of January 1973.

Robert L. Oswald,
Secretary.

(Seal)

DECISION AND ORDER

(Service Date December 13, 1973)

At a Session of the INTERSTATES COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 26th day of November, 1973.

No. MC-F-11133

RELIABLE TRUCK LINES, INC—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-128944 (Sub-No. 9)

RELIABLE TRUCK LINES, INC., EXTENSION—ALABAMA

No. MC-F-11134

COOPER TRANSFER CO., INC—PURCHASE (PORTION) —A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-55889 (Sub-No. 39)

COOPER TRANSFER CO., INC., EXTENSION—ALABAMA

No. MC-F-11143

GORDONS TRANSPORTS, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-11220 (Sub-No. 123)

GORDONS TRANSPORTS, INC., EXTENSION—ALABAMA

No. MC-F-11150

THE MASON & DIXON LINES, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC 59983—(Sub-No. 130)

THE MASON & DIXON LINES, INC., EXTENSION—ALABAMA

Upon consideration of the application and record in the above-entitled proceedings, including the report and recommended order of the Administrative Law Judge, served January 19, 1973, and (A) the exceptions filed by applicants Reliable Truck Lines, Inc., Cooper Transfer Co., Inc., Gordons Transport, Inc., Mason & Dixon Lines, Inc., and A-OK Motor Lines, Inc. (Sammuel Kaufman-Trustee in Bankruptcy), and the replies thereto filed by certain protestants,[1] and (B) the exceptions filed by protestants Birmingham-Nashville Express, Inc., Central Motor Express, Inc., Braswell Motor Freight, Inc., and jointly by Baggett Transportation Company, Bee Line Express, Inc., Bowman Transportation, Inc., Georgia-Florida Alabama Transportation Company, Floyd & Beasley Transfer Company, Inc., Hall Motor Express, Inc., Hiller Truck Lines, Inc., North Alabama Express, Inc., and Ross Neely Express, Inc., and the replies thereto filed by applicants;

It appearing, That the Administrative Law Judge conditioned consummation of the approved transactions upon

---

1. Individually by Birmingham-Nashville Express, Inc. and Central Motor Express, Inc., and jointly by Baggett Transportation Company, Bee Line Express, Inc., Bowman Transportation, Inc., Georgia-Florida-Alabama Transportation Company, Floyd & Beasley Transfer Company, Inc., Hall Motor Express, Inc., Hiller Truck Lines, Inc., North Alabama Express, Inc., and Ross Neely Express, Inc.

approval by the Alabama Public Service Commission of the transfer of the Alabama intrastate authority which underlies vendor's certificate of registration; that the imposed condition was in accord with the agreement entered into between the applicants; that the Alabama Public Service Commission, by order dated October 30, 1972, denied vendees' applications for purchase of vendor's intrastate rights; that applicants have appealed the Alabama Public Service Commission's order to the appropriate state court; and that as applicants expect protracted litigate in before a final order is entered by the highest judicial forum available, and as vendor, a bankrupt, desires to pay off creditors at the earliest possible date, applicants, as part of their exceptions, request that this Commission modify the order of the Administrative Law Judge so as to allow the sale of vendor's interstate authority prior to a court decision on the sale of vendor's intrastate authority;

It further appearing, That, as pertinent, section 206(a)(7)(A) provides that certificates of registration "may not be transferred apart from the transfer of the corresponding intrastate certificate;"

It further appearing, That in the event the transactions in No. MC-F-11143 and No. MC-11220 (Sub-No. 123) are consummated and so as to avoid expansion of the points it is authorized to serve; Gordons Transports, Inc.'s, certificate in No. MC-11220 (Sub-No. 123) shall be restricted against service to and from Columbus, Ga. and points within its commercial zone; and

It further appearing, That the findings and conclusions of the Administrative Law Judge with respect to all matters of fact and law considered and disposed of in his report, except as herein modified, are, in all material respects proper and correct; that the exceptions of applicants and

protestants raise no new or material issued as matter of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in his report; and that the exceptions and replies otherwise are not of such a nature as to require the issuance by Division 3 of a report discussing the evidence in the light of the pleadings;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the exceptions and reply thereto does not warrant a different result from that reached by the Administrative Law Judge, that the statement of facts, the conclusions and findings of the Administrative Law Judge, as modified above, being proper and correct in all material respects, shall be, and they are hereby, affirmed and adopted as our own; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969:

It is ordered, That Gordon's certificate in No. MC-11220 (Sub-No. 123) shall be and it is hereby restricted against the transportation of traffic originating at or destined to Columbus, Ga., and points within its commercial zone.

It is further ordered, That order of the Administrative Law Judge served January 19, 1973 as amended herein, be, and it is hereby, adopted as the order of the Commission, Division 3, effective 35 days from the date of service hereof.

By the Commission, Division 3.

Robert L. Oswald,
Secretary

(Seal)

ORDER

(Service Date May 30, 1974)

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 21st day of May, 1974.

No. MC-F-11133

RELIABLE TRUCK LINES, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-128944 (Sub-No. 9)

RELIABLE TRUCK LINES, INC., EXTENSION—ALABAMA

No. MC-F-11134

COOPER TRANSFER CO., INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-55889 (Sub-No. 39)

COOPER TRANSFER CO., INC.—EXTENSION—ALABAMA

No. MC-F-11143

GORDONS TRANSPORTS, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-11220 (Sub-No. 123)

GORDONS TRANSPORTS, INC., EXTENSION—ALABAMA

No. MC-F-11150

THE MASON & DIXON LINES, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-59583 (Sub-No. 130)

THE MASON & DIXON LINES, INC., EXTENSION—ALABAMA

Upon consideration of the record in the above-entitled proceedings, including (1) the report and recommended order of an Administrative Law Judge, served January 19, 1973, (2) a decision and order of the Commission, Division 3, dated November 26, 1973, modifying the report and recommended order in a minor respect, (3) petitions for reconsideration filed (a) individually by Reliable Truck Lines, Inc. (Reliable) on February 26, 1974, Gordons Transports, Inc. (Gordons) on February 26. 1974, and A-OK Motor Lines, Inc. (Sammuel Kaufman, Trustee in Bankruptcy), hereinafter called A-OK, on February 25, 1974, and (b) jointly, by Cooper Transfer Co., Inc. (Cooper) and The Mason & Dixon Lines, Inc., (Mason & Dixon) on March 12, 1974, also requesting reopening of the proceedings and oral argument before the Commission, and by protestants Baggett Transportation Company, Bee Lines Express, Inc., Bowman Transportation, Inc., Georgia-Florida-Alabama Transportation Company, Floyd & Beasley Transfer Company, Inc., Hall Motor Express, Inc., Hiller Truck Lines, Inc., North Alabama Express, Inc., and Ross Neely Express Inc., hereinafter called joint protestants, on March 11, 1974, (4) petitions for oral argument before the Commission filed by Reliable on February 26, 1974, and A-OK on February 25, 1974, (5) replies to applicants' petitions filed by joint protestants in two separate pleadings on March 13, 1974, and March 27, 1974, and by protestant Birmingham-Nash-

ville Express, Inc. and (6) replies to joint protestants' exceptions filed by Cooper and Mason & Dixon in a joint pleading and by A-OK and Reliable in individual pleadings,

It appearing, That applicants, among other things, seek to introduce evidence of amendments to the respective sales contracts, wherein sales of interstate operating rights embodied in a certificate of registration are proposed, without sale of corresponding intrastate rights, shall this Commission so permit; that said amendments would not significantly affect our determinations herein, or adversely affect any party herein; and, thus, such evidence should properly be admitted into evidence;

It further appearing, That applicants' petitions seek authority to transfer vendor's rights, embodied in a certificate of registration, apart from the underlying, corresponding intrastate rights in Alabama; that this Commission has consistently refused to sanction sale of rights embodied in a certificate of registration when the purchaser would not also acquire the corresponding intrastate authority, see *Cook Motor Lines, Inc.—Purchase (Portion)—Epperly Motor Freight, Inc.*, 116 M.C.C. 300, and hence the petitions must be denied in this respect; that, however, applicants are engaged in litigation before the Alabama courts in an effort to secure permission for transfer of the Alabama intrastate rights and hence reverse an adverse decision by the Alabama Public Service Commission; that, accordingly, until applicants exhaust their administrative and judicial remedies in the State of Alabama, final determination of the instant proceedings is not appropriate, since final outcome of the Alabama litigation will determine applicants' ability to sell intrastate authority, as required, with corresponding interstate authority; and that, accordingly, operations under temporary authority should be permitted to continue until future final determination of the proceedings by the Commission;

It further appearing, That good cause has not been shown for oral argument before the Commission; that the petitions, except as indicated above, set forth no material facts or arguments of any substance which were not considered by Division 3 in connection with its decision and order dated November 26, 1973, or which warrants other reconsideration of said decision and order; and that, otherwise, reconsideration is not warranted:

It is ordered, That amendments to the sales contracts in the respective proceedings be, and they are hereby, accepted into evidence of record.

It is further ordered, That the Commission shall not make a final determination in these proceedings, pending resolution of the above-noted litigation in Alabama involving vendor's intrastate rights; that when such litigation is finally concluded, applicants shall inform the Commission within 20 days and shall, in the case approval for sale is obtained, file a petition fc further reconsideration in these proceedings; and that, pending such final determination by Commission order, the authority granted by orders dated April 28, 1971, in No. MC-F-11133 and May 4, 1971, in No. MC-F-11134, No. MC-F-11143, and No. MC-F-11150, as extended by orders of September 15, 1971, authorizing Reliable Truck Lines, Inc., Cooper Transfer Co., Inc., Gordons Transports, Inc., and Mason & Dixon, Inc., respectively, to lease temporarily certain portions of the operating rights of A-OK Motor Lines, Inc. shall be, and remain in full force and effect; and

It is further ordered, That, except to the extent granted herein, that the petitions be, and they are hereby, denied.

By the Commission, Division 3, acting as an Appellate Division.

Robert L. Oswald
Secretary

(Seal)

ORDER

(Service Date June 16, 1975)

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 6th day of June, 1975.

No. MC-F-11133

RELIABLE TRUCK LINES, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-128944 (Sub-No. 9)

RELIABLE TRUCK LINES, INC., EXTENSION —ALABAMA

No. MC-F-11134

COOPER TRANSFER CO., INC.—PURCHASE (PORTION—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-55889 (Sub-No. 39)

COOPER TRANSFER CO., INC., EXTENSION —ALABAMA

No. MC-F-11143

GORDONS TRANSPORTS, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-11220 (Sub-No. 123)

GORDONS TRANSPORTS, INC., EXTENSION —ALABAMA

No. MC-F-11150

THE MASON & DIXON LINES, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-59583 (Sub-No. 130)

THE MASON & DIXON LINES, INC., EXTENSION —ALABAMA

Upon consideration of the record in the above-entitled proceeding, including (1) the report and recommended order of the administrative law judge, served January 19, 1975 [sic 1973], which granted the applications, subject to the approval of the Alabama Public Service Commission of the transfer of the intrastate certificate, (2) the decision and order of the Commission, Division 3, dated November 26, 1973, (3) the order of the Commission, Division 3, acting as an Appellate Division, dated May 21, 1974 denying applicants' first petition for recondsideration, (4) the petition for further reconsideration filed jointly March 27, 1975 by applicants Reliable Truck Lines, Inc., Cooper Transfer Co., Inc., Gordons Transports, Inc., The Mason & Dixon Lines, Inc., and A-OK Motor Lines, Inc., (Sammuel Kaufman, Trustee in Bankruptcy), (5) the reply thereto filed jointly April 21, 1975 by protestants Bowman Transportation, Inc., Georgia-Florida-Alabama Transportation Company, Floyd & Beasley Transfer Company, Inc., Hiller Truck Lines, Inc., North Alabama Express, Inc., and Bee Line Express, Inc. (hereinafter, the joint protestants) and (6) the reply filed April 22, 1975 by protestant Birmingham-Nashville Express, Inc.; and

It appearing, That Division 3, in its order dated May 21, 1974, postponed final determination of the instant proceedings pending final resolution of litigation in Alabama concerning applicants' intrastate rights; that the Circuit Court of Covington County, Alabama has issued an order approving the transfer of vendor's intrastate authority, and therefore applicants' petition herein for approval of the above-entitled applications;

It further appearing, That the order of the Circuit of Covington County, Alabama is being appealed to the Supreme Court of Alabama by the Alabama Public Service Commission, and by joint protestants; that the Alabama Public Service Commission has not issued an order approving the transaction and will not be required to issue such order until after appeal to the Alabama Supreme Court; that if this Commission were to grant this petition and the Alabama Supreme Court were to reverse the Circuit Court the result would be Commission approval of a sale of a certificate of registration, apart from the underlying intrastate rights; that this Commission has consistently refused to sanction such sales, see *Cook Motor Lines, Inc.—Purchase (Portion)—Epperly Motor Freight Inc.,* 116 M.C.C. 300; and that accordingly, until the final outcome of the Alabama litigation determines applicants' ability to sell the intrastate authority, final determination of the instant proceeding is inappropriate:

It is ordered, That the Commission shall not make a final determination in these proceedings pending resolution of the above-noted litigation in Alabama involving vendor's intrastate rights; that when said litigation is finally concluded, and approval of the sale of the intrastate rights is obtained, applicants may file a petition for further reconsideration in these proceedings.

It is further ordered, That the petition be, and it is hereby denied, without prejudice to the filing of a petition for further reconsideration as described above, and

It is further ordered, That the order of the Commission, Division 3, acting as an Appellate Division, dated May 21, 1974, shall remain in full force and effect.

By the Commission, Division 3, acting as an Appellate Division.

Richard W. Kyle
Acting Secretary.

(Seal)

ORDER

(Service Date, July 10, 1974)

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 28th day of June, 1974.

No. MC-F-11133

RELIABLE TRUCK LINES, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-128944 (Sub-No. 9)

RELIABLE TRUCK LINES, INC., EXTENSION —ALABAMA

No. MC-F-11134

COOPER TRANSFER CO., INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-55889 (Sub-No. 39)

COOPER TRANSFER CO., INC., EXTENSION —ALABAMA

No. MC-F-11143

GORDONS TRANSPORTS, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-11220 (Sub-No. 123)

GORDONS TRANSPORTS, INC., EXTENSION —ALABAMA

No. MC-F-11150

THE MASON & DIXON LINES, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-59583 (Sub-No. 130)

THE MASON & DIXON LINES, INC., EXTENSION —ALABAMA

Upon consideration of the record in the above-entitled proceedings, including the petitions of certain applicants, Cooper Transfer Co., Inc. and the Mason & Dixon Lines, Inc., filed June 12, 1974, and Sammuel Kaufman, Trustee in Bankruptcy, for A-OK Motor Lines, Inc., filed June 14, 1974, seeking a finding that an issue of general transportation importance is involved; and

It appearing, That no issue of general transportation importance is involved in these proceedings:

It is ordered, That the said petitions be, and they are hereby denied, without prejudice to the future filing of such petitions as may be appropriate.

By the Commission.

Robert L. Oswald,
Secretary.

(Seal)

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

INTERSTATE COMMERCE COMMISSION

(Served September 3, 1976)

No. MC-F-11133[1]

RELIABLE TRUCK LINES, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

Decided August 12, 1976

On further consideration, findings in the decision and order of the Commission, Division 3, dated November 26, 1973, affirming the recommended report and order of an Administrative Law Judge approving the application, subject to conditions, and the orders of the Commission, Division 3, dated May 21, 1974, and June 6, 1975, modified and affirmed.

Phineas Stevens, John A. Crawford, Kim D. Mann, W. F. Goodwin, and *James Clarence Evans* for applicants.

Maurice F. Bishop and *Walter Harwood* for protestants.

REPORT OF THE COMMISSION ON FURTHER CONSIDERATION

DIVISION 3, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS BROWN, MacFARLAND, AND CORBER

---

1. This report also embraces Docket Nos. MC-128944 (Sub-No. 9), Reliable Truck Lines, Inc., Extension—Alabama, MC-F-11134, Cooper Transfer Co., Inc.—Purchase (Portion)—A-OK Motor Lines, Inc. (Sammuel Kaufman, Trustee in Bankruptcy), MC-55889 (Sub-No. 39), Cooper Transfer Co., Inc., Extension—Alabama, MC-F-11143, Gordons Transports, Inc.—Purchase (Portion)—A-OK Motor Lines, Inc. (Sammuel Kaufman, Trustee in Bankruptcy), MC-11220 (Sub No. 123), Gordons Transports, Inc., Extension—Alabama, MC-F-11150, The Mason & Dixon Lines, Inc. —Purchase (Portion)—A-OK Motor Lines, Inc. (Sammuel Kaufman, Trustee in Bankruptcy), and MC-59583 (Sub-No. 130), The Mason & Dixon Lines, Inc., Extension—Alabama.

BY THE DIVISION:

These proceedings were heard on a consolidated record and the report and recommended order of the Administrative Law Judge which conditionally approved the applications was adopted as the order of the Commission by a decision and order of division 3, dated November 26, 1973. By orders dated May 21, 1974, and June 6, 1975, the division denied petitions for reconsideration of the decision and order. In an order served July 10, 1974, the Commission denied applicants' petition to have the matter declared to be one of general transportation importance. The instant report, which modifies the previously imposed conditions, is in response to various petitions which are described in detail below. Except as modified herein, we find the statement of facts and conclusions in the prior report and orders herein to be correct in all material respects and we adopt such findings as our own. The facts will be repeated only as needed for clarity of discussion.

In No. MC-F-11133, by joint application filed April 6, 1971, Reliable Truck Lines, Inc. (Reliable), of Nashville, Tenn., and Sammuel Kaufman, Trustee in Bankruptcy (trustee) of Montgomery, Ala., for A-OK Motor Lines, Inc. (A-OK), seek authority under section 5 of the Interstate Commerce Act for the purchase by Reliable of a portion of the operating rights of A-OK contained in certificate of registration No. MC-121218 (Sub-No. 1) for a total purchase price of $130,000. In the same application, Garland Parsley seeks authority to control the operating rights through the proposed transaction.

In No. MC-128944 (Sub-No. 9), Reliable, by application filed July 16, 1971, and as a matter directly related to the proceeding in No. MC-F-11133, seeks a certificate of public convenience and necessity under section 207 of the act authorizing it to engage in operations in interstate or

foreign commerce, as a common carrier by motor vehicle, over irregular routes, in the transportation of general commodities (except those of unusual value, household goods as defined by the Commission, commodities in bulk, dangerous explosives, and commodities requiring special equipment) between Birmingham, Ala., and points within 15 miles thereof, on the one hand, and Tuscumbia and Sheffield, Ala., on the other hand.

In No. MC-F-11134, by joint application filed April 6, 1971, Cooper Transfer Co., Inc. (Cooper), of Brewton, Ala., and the trustee seek authority under section 5 for the purchase by Cooper of portions of the operating rights of A-OK contained in its certificates of registration No. MC-121218 (Sub-Nos. 1 and 2) for $50,000, and terminal property at Decatur, Ala., for $32,000. In the same application, AAA Motor Lines, Inc., and John H. Dove seek authority to control the operating rights and property through the proposed transaction.

In No. MC-55889 (Sub-No. 39), Cooper, by application filed June 18, 1971, as amended, and as a matter directly related to the proceeding in No. MC-F-11134, seeks a certificate of public convenience and necessity under section 207 authorizing it to operate, in interstate or foreign commerce, as a common carrier by motor vehicle, in the transportation of: (1) explosives, over regular routes, between the U.S. Ordnance Depot located at or near Bynum, Ala., and Camp Rucker, Ala., from Bynum over U.S. Highway 78 to Anniston and Oxford, thence to the junction of Alabama Highway 37 to Opelika, thence over U.S. Highway 29 to Banks, thence over U.S. Highway 231 to Ozark, thence over Alabama Highway 85 to Camp Rucker, and return over the same routes, serving no intermediate points; (2) general commodities (except commodities in bulk), over regular routes, between Montgomery and Opp, Ala., over

U.S. Highway 331, serving no intermediate points; and (3) general commodities (except commodities in bulk) over irregular routes, between Birmingham, Ala., and points within 15 miles thereof, on the one hand, and, on the other, Andalusia, Athens, Auburn, Brundidge, Citronelle, Clayton, Cullman, Decatur, Demopolis, Dothan, Elba, Enterprise, Eufaula, Eutaw, Fairhope, Fayette, Flomation, Florala, Foley, Greensboro, Haleyville, Hartselle, Headland, Huntsville, Jasper, Linden, Luverne, Monroeville, Opp, Ozark, Robertsdale, Russellville, Samson, Stevenson, Troy, Tuscaloosa, Union Springs, and Uniontown, Ala.

In No. MC-F-11143, by joint application filed April 12, 1971, Gordons Transports, Inc. (Gordons), of Memphis, Tenn., and the trustee seek authority under section 5 for the purchase by Gordons of a portion of the operating rights of A-OK contained in certificate of registration No. MC-121218 (Sub-No. 1) for $130,000. In the same application, M. M. Gordon, A. W. Gordon, Jr., J. K. Gordon, Esther G. Cato, and Mary G. Conaway seek authority to control the operating rights through the proposed transaction.

In No. MC-11220 (Sub-No. 123), Gordons, by application filed May 14, 1971, and as a matter directly related to the proceeding in No. MC-F-11143, seeks a certificate of public convenience and necessity under section 207 authorizing it to operate in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, in the transportation of commodities generally (except classes A and B explosives, household goods as defined by the Commission, commodities in bulk and those requiring special equipment) between Birmingham, Ala., and points within 15 miles thereof, on the one hand, and, on the other, Albertville, Alexander City, Boaz, Centre, Fairfax, Fort Payne, Guntersville, Oneonta, Opelika, Phenix City, Scottsboro, Sylacauga, Talladega, Tuskegee, and Wetumpka, Ala.

In No. MC-F-11150, by joint application filed April 20, 1971, as amended, The Mason and Dixon Lines, Inc. (M & D), of Kingsport, Tenn., and the trustee seek authority under section 5 for the purchase by M & D of a portion of operating rights of A-OK contained in certificate of registration No. MC-121218 (Sub-No. 1) for a total purchase price of $305,000. E. William King, Margaret K. Norris, and John R. King join in this application as applicants for authority to control the operating rights through the proposed transaction.

In No. MC-59583, M & D, by application filed June 30, 1971, and as a matter directly related to the application in No. MC-F-11150, seeks a certificate of public convenience and necessity under section 207 authorizing it to operate in interstate or foreign commerce as a common carrier, over regular routes, in the transportation of general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading) between Birmingham, Ala., and points within 15 miles thereof, and Mobile, Ala., and points within 10 miles thereof, over U.S. Highway 31, serving all intermediate points and the off-route points of Kilby, Prattville, and Siluria, Ala.

BACKGROUND

By application filed in April 1971, the four vendees herein, Gordons, Reliable, Cooper, and M & D each sought authority to purchase a portion of the A-OK certificates of registration authorizing service between Birmingham and certain specified points in Alabama. Each of the vendees, which are all multi-State carriers, filed the necessary directly related applications under section 207 of the act to convert the certificate of registration embodying the op-

erating authority to be acquired into a certificate of public convenience and necessity. Concurrently, applications were filed with the Alabama Public Service Commission seeking approval for the sale of the underlying intrastate certificates of A-OK.

By Commission orders,[2] Reliable, Cooper, Gordons, and M & D were granted temporary authority under section 210a(b) to lease and operate the specified portions of the property to be purchased pending determination of their section 5 applications. Operations under the temporary authority commenced during May 1971 and have continued to the present date.

After hearings on a consolidated record a report and recommended order, served January 19, 1973, recommended approval of the applications subject to the usual condition that concurrent State approval for the transfer of the underlying intrastate rights be shown. This report and recommended order was adopted (with a minor modification) by division 3 in the aforementioned decision and order.

Subsequently, the applicants filed various petitions for reconsideration, addressing the question of the appropriateness of the condition requiring concurrent State approval and filed amendments to their respective contracts which would make consummation of each of the transactions no longer contingent upon State approval. In an order dated May 21, 1974, these amendments were accepted into evidence, but the petitions for reconsideration were denied. That order continued temporary authority operations "until future final determination of the pro-

2. These separate orders are dated April 28, 1971, in No. MC-F-11133; May 4, 1971, in Nos. MC-F-11134, MC-F-11143, and MC-F-11150, and have all been extended pending final determination of the section 5 application.

ceedings by the Commission" and ordered that the parties inform the Commission within 20 days after final action in the then pending Alabama litigation. In an order served July 10, 1974, the entire Commission denied applicants' petitions seeking to have the matter declared to be one of general transportation importance.

The Alabama Public Service Commission (APSC) in an order dated October 30, 1972, had denied the application for the transfer of the Alabama intrastate certificates. On February 11, 1975, the Circuit Court of Covington County, Ala., issued an order reversing the APSC. This order was appealed by protestants and the APSC to the Supreme Court of Alabama.[3]

On the basis of that order the applicants petitioned this Commission for final approval of the transactions. By order dated June 16, 1975, the division denied these petitions pending final disposition of the Alabama litigation.

By decision rendered December 18, 1975, the Alabama Supreme Court reversed the Circuit Court and affirmed the decision of the APSC denying the applications. On February 5, 1976, the Alabama Supreme Court denied applications for rehearing. In response to these orders the Circuit Court on February 19, 1976, issued an order affirming the APSC decision. Thus the Alabama litigation is now final.[4]

3. The protestants in the State litigation are also protestants before this Commission. They are Bowman Transportation, Inc., Georgia-Florida-Alabama Transportation Company, Floyd & Beasley Transfer Company, Inc., Hiller Truck Lines, Inc., North Alabama Express, Inc., Bee Line, Express, Inc., and Baggett Transportation Company, hereinafter joint protestants.

4. On February 18, 1976, vendor and M & D, filed with the APSC an application for rehearing and/or amended application for approval of the transfer, asking said Commission to reconsider its prior order denying the transfer of vendor's regular-route authority to M & D. The pendency of this application should not delay disposition of the instant petitions.

PLEADINGS OF THE PARTIES

Upon conclusion of the Alabama litigation the joint protestants filed a pleading styled a "request and petition for final order in all proceedings and for concurrent termination of orders approving temporary lease of involved rights," which cites the decision of the Supreme Court of Alabama and requests a final order denying the pending applications. Applicants have filed a joint reply to this petition which contends that no final order should be entered until the below-described petitions are disposed of.

The vendor and all four vendees have filed separate petitions seeking further reconsideration and modification of the previously imposed conditions to approval of the transactions, or in the alternative, reopening of the proceedings for further hearing. The applicants request that in lieu of the condition requiring APSC decision approval for the transfer of the underlying State certificate the following condition be substituted:

> Vendor shall prior to or concurrently with the issuance of said certificates to said vendees, file with the Commission a certified copy of a written request as filed by vendor with the Alabama Public Service Commission for the surrender and cancellation of all intrastate operating authority held by vendor.

Applicants contend that this condition calling for the cancellation of the underlying intrastate certificate will satisfy section 206 of the act, which provides that certificates of registration may not be transferred apart from the transfer of the corresponding intrastate certificate. It is applicants' position that under this present proposal there will be no transfer of the certificate of registration apart from the corresponding intrastate certificate because the State certificate will be eliminated. Applicants argue

that this cancellation of the State certificate will satisfy the statutory intent to prevent the creation of two interstate operating rights from a single intrastate certificate, without a showing of public convenience and necessity for the additional service.

Applicants argue that the section 5 transactions have already been found by the Commission to be in the public interest and that based on vendor's past service and the evidence of public need provided by the shipper support witnesses presented at the hearing, the public convenience and necessity was found to require the approval of the section 207 applications. Applicants contend that this evidence of public need distinguishes the case from *Cook Motor Lines, Inc.—Pur.—Epperly Motor Freight, Inc.* 116 M.C.C. 300 (1972) on which the Commission based its previous orders denying the transfer of the certificate of registration apart from the State certificate. Also, it is noted that the *Cook* case did not contemplate the cancellation of the State certificate.

Applicants further argue that even if the technicalities do not permit the approval of the section 5 applications, the section 207 applications should be approved in any event. They contend that the previously adduced evidence of public need, and the lack of adverse effect on protestants, along with the evidence of operations during temporary authority show that public convenience and necessity require approval of the applications. To support this contention each of the vendees has attached to its petition numerous letters and affidavits from shippers supporting the application. Alternatively, the applicants request that the Commission reopen the proceedings for the receipt of additional evidence or for further hearings on the issue of the continuing public need for vendees' services.

Subsequent to the filing of the above-described petitions the applicants all filed supplements to the petitions citing an order of the Commission, Division 3, served April 7, 1975, in No. MC-F-10671, *Branch Motor Express Company—Purchase—Suter, Inc.* (not printed), at precedent for the relief requested in the petitions.[5] Applicants only became aware of this decision after the filing of the initial petitions.

Replies and motions to strike applicants' petitions and the letters and affidavits attached thereto have been filed by protestant Birmingham-Nashville Express, Inc., and by joint protestants. Applicants have replied to the motions to strike. Protestants contend that the Commission has already denied two petitions for reconsideration and that with the conclusion of the Alabama litigation these proceedings are now final. They argue that there is no provision for the filing of any further petitions herein.

They further argue that the proposed condition will not satisfy section 206 of the act and that the *Branch* case is distinguishable from the instant situation because no State commission or court made a finding therein that the transactions were inconsistent with the public interest. Protestants also dispute applicants' contention that division 3 may approve a directly related section 207 application where the section 5 application is denied.

Protestants request that the letters and affidavits submitted with the petitions relating to matters subsequent to the hearing be stricken. It is alleged that they constitute a violation of rule 86 of the Commission's General Rules of Practice.

Applicants, in their joint reply to the motion to strike, note that although the caption to the pleading indicates

5. Cooper and M & D filed their supplement jointly.

that protestants seek to strike the petitions themselves, the body of the pleadings request only that the Commission strike the letters and affidavits. Applicants reply that these petitions are in effect amendments to the application, that they seek alternative relief such as the reopening of these proceedings for further hearing, and that the letters and affidavits are appropriate to these alternative requests.

DISCUSSIONS AND CONCLUSIONS

Applicants' proposal that the Commission approve these transactions subject to the cancellation of vendor's underlying intrastate rights is substantively different from the previously rejected proposal[6] that the Commission approve the sale of vendor's certificates of registration while vendor retained the underlying State certificates. Therefore, applicants' petitions raise questions not previously considered which deserve examination herein.

However, the only issue confronting us at this point in the proceedings is whether or not this new proposal is in conformity with section 206(a)(6) and (7) of the Interstate Commerce Act. The Commission has already found that approval of the section 5 transactions would be consistent with the public interest; that there is a public need for vendees' services; and that, accordingly, the public convenience and necessity require approval of the directly related section 207 applications. The only determination to be made here is one of law. That is, whether or not the cancellation of vendor's intrastate rights will satisfy section 206. Thus there is no need to reopen these proceedings for further hearing or for the receipt of additional evidence, and we will grant protestant's motion to strike

6. In our decision and order of November 26, 1973, and our order of May 21, 1974.

the supplemental evidence of continuing need contained in the letters and affidavits attached to applicants' petitions.

As previously stated we have already determined that these transactions are consistent with the public interest and that there is a public need for vendees' service. The fact that the APSC has found otherwise concerning the intrastate rights in no way alters our determination. Section 5 of the act vests this Commission with exclusive and plenary jurisdiction over transactions of this nature. As we stated in *Eagle Motor Lines, Inc.—Pur.—Victory Frt. Lines, Inc.*, 101 M.C.C. 368, 372 (1966), affirmed in *Eagle Motor Lines, Inc.* v. *United States*, 271 F. Suppl. 594 (N.D. Ala. 1967):

> * * * any action that may have been taken by the Alabama Commission respecting the transfer of the intrastate rights is not controlling or determinative of any action of this Commission in proceedings of the nature here involved.[7]

Thus the State action certainly does not foreclose this Commission from giving final approval to this transaction, if applicant's proposal is, in fact, in conformity with the act.

To make that determination it is necessary to examine the history of section 206 and the Commission's handling of this type of proceeding. Prior to 1962 intrastate certificates held by single State carriers were registered with the Commission under the second proviso of section 206 (a)(1) of the act. From the outset the Commission held that it had the power to authorize a multi-State carrier to purchase or control operating rights arising under the

7. In *Eagle* the Commission disapproved the transaction although the APSC had approved the sale of the State certificate.

former proviso; that evidence of past lawful operations under the proviso, in and of itself, was evidence of a public need for continuance of the provided service; and that on the basis of such evidence an application filed under section 207 of the act for a certificate of public convenience and necessity, as a matter directly related to the section 5 transaction, would be granted. *C & D. Motor Delivery Co.—Purchase—Elliott*, 38 M.C.C. 547 (1942).

In 1962 section 206(a) was amended to provide for the issuance by the Commission of certificates of registration which authorize the holder to conduct operations of the type theretofore authorized under the proviso. The Commission in *T.I.M.E. Freight, Inc.—Merger*, 97 M.C.C. 310 (1964), applied the *Elliot* case principles to multi-State carrier acquisitions of certificates of registration.

The legislative intent of Congress in adopting these amendments was to preserve rights and privileges which had been recognized under the proviso, while, at the same time, eliminating the abuses which had arisen under the proviso. *Delta Lines, Inc.—Control and Merger*, 97 M.C.C. 411, 419 (1965). One such abuse was that carriers with both interstate and intrastate rights would sell their interstate rights while retaining their intrastate rights, and then use the latter rights to support operations under the proviso thereby creating new duplicating interstate operations without a showing of public convenience and necessity for such new service. To avoid this result the Commission would condition approval of section 5 applications so that neither the vendor nor anyone affiliated with vendor could use the retained intrastate certificate in support of operations under the proviso. In other instances, the Commission would require the purchaser of the interstate rights to also acquire the intrastate rights. Some-

times, if the separation had already occurred, the transaction would be denied. See cases cited in *T.I.M.E., supra*, p. 326.

However, the Commission was powerless to prevent such abuses arising in connection with applications under section 212(b). Similarly, in situations where the intrastate certificate was transferred apart from the interstate certificate the Commission could not refuse to accept the filing of the transferred State certificate in support of new duplicative interstate rights. It was to prevent these abuses that the nonseverability clause of section 206(a)(6) and (7) was enacted.[8] In other words the language was designed to give the Commission the power it previously had under section 5, but lacked under section 212(b), to prevent the creation of two interstate operating rights from a single intrastate certificate. *H. C. Daniel, Houston, Tex., Transferee*, 104 M.C.C. 899, 904 (1969). In view of this legislative intent the Commission acknowledged in the *Daniel* case that in appropriate cases it can permit a technical separation between the interstate and intrastate certificates, if the possibility of creating two interstate operating rights could be eliminated.[9]

When viewed in this context, applicants' proposal to condition approval of these transactions on the cancellation of the underlying intrastate rights clearly satisfies the congressional intent behind section 206(a)(6) and (7) and will not be inconsistent with the line of cases where the Commission denied the transfer of the interstate rights

8. See *Navajo Freight Lines, Inc.* v. *United States*, 263 F. Supp. 438 (C.D. Calif. 1967) which affirmed *T.I.M.E., supra*, for a detailed analysis of the legislative intent behind the 1962 amendments.

9. In *Daniel* the State commission had authorized the transfer of the State certificate prior to Commission approval of the transfer of the interstate certificate.

while vendor retained control of the intrastate certificate.[10] With the cancellation of the underlying intrastate certificate there will be no opportunity to use said certificate to create duplicating interstate rights. The Commission acknowledged that such cancellation would serve this purpose in *Branch, supra*. In that case the State commission had canceled the intrastate certificate during the pendency of the litigation before this Commission because the vendor there had failed to comply with certain regulations of the State commission during such litigation.[11]

It should be remembered that by definition certificates of registration may be held only by single State carriers. Thus when a multi-State carrier acquires a certificate of registration what actually happens, through the means of the appropriate applications, as described in *Elliott, supra*, is that the Commission order approving the transaction requires the cancellation of the certificate of registration, and the multi-State vendee is issued a certificate of public convenience and necessity authorizing the interstate service. The Administrative Law Judge's report and recommended order in these proceedings, which has been affirmed by the Commission, specifically requires submission of vendor's certificate of registration for cancellation. Thus, it is not literally correct to say that what is involved in such circumstances is a "transfer" of a certificate of registration. The certificate of registration no longer exists. The operations that it authorized are now contained in the newly issued certificate of public convenience and necessity.

10. See *Cook, supra*.

11. The fact that there was no finding in *Branch* by the State commission that the transaction would be inconsistent with the public interest (as here) does not affect that case's applicability to the instant situation. See the above discussion concerning the Commission's exclusive, plenary jurisdiction in these proceedings.

Accordingly, considering the legislative intent behind the nonseverability clause in section 206 and the realities of the situation as described above, we conclude that final approval of the instant transactions, subject to the cancellation of the Alabama State certificates, will not violate the statutory prohibition against the transfer of certificates of registration "apart from the transfer of the corresponding intrastate certificate," and will, in fact, accomplish the purpose for which such prohibition was designed.

We note, however, that the condition suggested by applicants calls for the vendor to file with this Commission a certified copy of a written request to the Alabama Public Service Commission for the surrender and cancellation of its intrastate operating authority. There is always the possibility that for some reason the Alabama Public Service Commission will deny this request. Therefore, we will further condition our approval herein so that neither vendor nor anyone affiliated with vendor, or successor-in-interest to vendor, may use the retained intrastate certificates, if not canceled, in support of any future interstate operations.

Upon further consideration, we find that the findings in the prior recommended report and order as adopted by our decision and order dated November 26, 1973 (not printed), and in the orders of May 21, 1974 (not printed), and June 6, 1975 (not printed), should be affirmed and modified in accordance with the discussion herein.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, Acting as an Appellate Division, held at its office in Washington, D.C., on the 12th day of August 1976.

No. MC-F-11133

RELIABLE TRUCK LINES, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-128944 (Sub-No. 9)

RELIABLE TRUCK LINES, INC., EXTENSION —ALABAMA

No. MC-F-11134

COOPER TRANSFER CO., INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-55889 (Sub No. 39)

COOPER TRANSFER CO., INC., EXTENSION —ALABAMA

No. MC-F-11143

GORDONS TRANSPORTS, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-11220 (Sub-No. 123)

GORDONS TRANSPORTS, INC., EXTENSION —ALABAMA

No. MC-F-11150

THE MASON & DIXON LINES, INC.—PURCHASE (PORTION)—A-OK MOTOR LINES, INC. (SAMMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

No. MC-59583 (Sub-No. 130)

THE MASON & DIXON LINES, INC., EXTENSION —ALABAMA

Further consideration of the matters in the above-entitled proceedings having been made, and the Commission on the date hereof, having made and filed a report on reconsideration containing its findings of facts and conclusions thereon which report, together with the recommended report and order of the Administrative Law Judge as adopted by the decision and order of division 3 dated November 26, 1973, and the orders of division 3 dated May 21, 1974, and June 6, 1975, and the order of the entire Commission served July 10, 1974, is hereby made a part hereof.

It is ordered, That the decision and order of the Commission, division 3, dated November 26, 1973, which adopted the report and recommended order of the Administrative Law Judge approving the applications, subject to conditions, and the orders of the Commission, division 3, dated May 21, 1974, and June 6, 1975, be, and they are hereby, affirmed and modified, as described in the report herein, subject to the below-described conditions;

It is further ordered, That vendor shall, prior to consummation, file with the Commission a certified copy of a written request as filed by vendor with the Alabama Public Service Commission for the surrender and cancellation of intrastate operating authority held by vendor; and that neither vendor nor anyone affiliated with vendor,

or successor-in-interest to vendor, may use the retained intrastate certificates, if not canceled, in support of any future interstate operations;

It is further ordered, That 90 days from the date of service hereof, the authority granted by the orders of April 28, 1971, in No. MC-F-11133, May 4, 1971, in No. MC-F-11134, No. MC-F-11143 and in No. MC-F-11150, as extended, authorizing the vendee's temporary authority to lease the respective portions of vendor's authority, shall be of no further force and effect;

It is further ordered, That the authority herein granted shall not be exercised prior to the effective date and that this order shall be effective 20 days from the date it is served; and

It is further ordered, That except as herein modified the said decision and order of November 26, 1973, and the orders of May 21, 1974, and June 6, 1975, shall remain in full force and effect.

By the Commission, Division 3, Acting as an Appellate division.

Robert L. Oswald,
Secretary.

(Seal)

APPENDIX C

INTERSTATE COMMERCE ACT

§ 5, par. (2). Unifications, mergers, and acquisitions of control; procedures applicable

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) or paragraph (3) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any

part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon

the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f)-(h) [Not applicable; relates solely to railroads.]

§ 5, par. (12). Plenary nature of authority under section. The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall

assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

§ 17. Commission procedures delegation of duties; rehearings.

Divisions of Commission; Organization; Composition

(1) The Commission is authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time.

Such divisions shall be designated, respectively, division one, division two, and so forth, or by a term descriptive of the principal subject, work, business, or function assigned or referred to such divisions. The Commission may designate one or more of its divisions as appellate divisions. Any Commissioner may be assigned to such division or divisions as the Commission may direct, and the senior in service of the Commissioners constituting a division shall act as chairman thereof unless otherwise directed by the Commission. When a vacancy occurs in any division or when a Commissioner because of absence, or other cause, is unable to serve thereon, the Chairman of the Commission or any Commissioner designated by him for that purpose may serve temporarily on such division until the Commission otherwise orders.

Reference of Matters to Divisions, Individual Commissioners or Boards

(2) The Commission may by order direct that any of its work, business, or functions under any provision of law (except matters required to be referred to joint boards by section 305 of this title, and except functions vested in the Commission under this section), or any matter which shall have been or may be referred to it by Congress or by either branch thereof, be assigned or referred to any division, to an individual Commissioner, or to a board to be composed of three or more eligible employees of the Commission (hereinafter in this section called a "board") to be designated by such order, for action thereon, and the Commission may by order at any time amend, modify, supplement, or rescind any such assignment or reference. The following classes of employees shall be eligible for designation by the Commission to serve on such boards: examiners, directors or assistant directors of bureaus, chiefs of sections, and attorneys. The assign-

ment or reference, to divisions, of work, business, or functions relating to the lawfulness of rates, fares, or charges shall be made according to the character of regulation to be exercised and not according to the kind or class of the carriers involved or to the form or mode of transportation in which such carriers may be engaged. When an individual Commissioner, or any employee, is unable to act upon any matter so assigned or referred because of absence or other cause, the Chairman of the Commission may designate another Commissioner or employee, as the case may be, to serve temporarily until the Commission otherwise orders.

Conduct of Proceedings; Seal; Oaths; Quorum; Rules

(3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any

division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record and such record shall be made public upon the request of any party interested. All hearings before the Commission, a division, individual Commissioner or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest.

Powers of Divisions, Boards, Etc.; Effect of Orders, Etc.

(4) A division, an individual Commissioner, or a board shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission, and be subject to the same duties and obligations. The secretary and seal of the Commission shall be the secretary and seal of each division, individual Commissioner, or board. Except as otherwise provided in this section, any order, decision, or requirement of a division, an individual Commissioner, or a board, with respect to any matter so assigned or referred, shall have the same force and effect, and may be made and evidenced in the same manner as if made or taken by the Commission.

§306(a) (7) (A) In the case of any person who or which on October 15, 1962, was in operation solely within a single State as a common carrier by motor vehicle in intrastate commerce (excluding persons controlled by, controlling, or under a common control with, a carrier engaged in operations outside such State), and who or which was also lawfully engaged in such operations in

interstate or foreign commerce under the certificate exemption provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before October 15, 1962, or who or which would have been so lawfully engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, and has continued to so operate since October 15, 1962 (or if engaged in furnishing seasonal service only, was lawfully engaged in such operations in the year 1961 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person had no control, the Commission shall issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection. Such certificate of registration shall not exceed in scope the services authorized by the State certificate to be conducted in intrastate commerce, and shall be subject to the same terms, conditions, and limitations as are contained in or attached to the State certificate except to the extent that such terms, conditions, or limitations are inconsistent with the requirements established by or under this Act. If the effectiveness of the State certificate is limited to a specified period of time, the certificate of registration issued under this paragraph (7) shall be similarly limited. Operations in interstate and foreign commerce under such certificates of registration shall be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. Certificates of registration shall be valid only so long as the holder is a carrier engaged in operation solely within a single State, not controlled by, controlling, or under a common control with

a carrier engaged in operation outside such State, and except as provided in section 5 of this title and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce. The termination, restriction in scope, or suspension of the intrastate certificate shall on the 180th day thereafter terminate or similarly restrict the right to engage in interstate or foreign commerce unless the intrastate certificate shall have been renewed, reissued, or reinstated or the restrictions removed within said one hundred and eighty-day period. Such certificates of registration shall be subject to suspension or termination by the Commission in accordance with the provisions of this Act governing the suspension and termination of certificates of public convenience and necessity issued by the Commission.

§ 307. Issuance of certificate—Issuance authorized to qualified applicants for regular routes and between fixed termini

(a) Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity;

otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY),
Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

MAURICE F. BISHOP
BISHOP, SWEENEY & COLVIN
601-09 Frank Nelson Building
Birmingham, Alabama 35203
Counsel for Respondents

Dated: February 28, 1979
Due Date: March 7, 1979

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes and Texts

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY),
Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

The Fifth Circuit Court of Appeals held that motor carrier applicants should not be permitted to defeat or evade Section 206(a)(7)(A) of the Motor Carrier Act (49 U.S.C. § 306(a)(7)(A)), which specifically provides that such a certificate "may not be transferred apart from the transfer of the corresponding intrastate certificate" upon which the certificate of registration is based, by surrendering the intrastate certificate for cancellation; that amending the contract and application, after submission, without notice and hearing, and the "mutation of" issues from those noticed, necessarily present problems of serious magnitude". Further, that Division 3 of the Commission could only consider Section 207 applications which are "directly related" to Section 5(2) applications for purchase

because Division 1 applies a different standard in its determination of "unrelated" Section 207 applications. The petitioner necessarily argues that the Fifth Circuit was in error. The respondents submit that the decision was right and is supported by statutes and the uniform prior decisions discussed and relied upon in the opinion.

QUESTIONS PRESENTED

The questions involved may more accurately be summarized as follows:

1. Can motor carrier applicants defeat or evade 49 U.S.C. § 306(a)(7)(A) and transfer a registered certificate "apart from the transfer of the corresponding intrastate certificate" upon which it is based by surrendering the state certificate for cancellation?

2. Can Division 3 issue a motor carrier certificate under 49 U.S.C. § 307 which was noticed and heard as one "directly related" to a Section 5 transfer application where the Section 5 transfer application is denied and a different standard applies to such "unrelated" Section 207 application?

3. Can the Commission issue an order based upon a contract and application amended after submission and raising admittedly "substantively different" issues "from the previously rejected proposal"?

The respondents[1] submit that each of these questions should be answered in the negative.

1. This reply is filed on behalf of the following respondents, each of whom was a protestant throughout the Commission proceedings and petitioners in the United States Court of Appeals for the Fifth Circuit: Bowman Transportation, Inc., Georgia-Florida-Alabama Transportation Company, Floyd & Beasley Transfer Company, Inc., Hiller Truck Lines, Inc., North Alabama Express, Inc., and Bee-Line Express, Inc.

STATEMENT OF THE CASE

A-OK Motor Lines, Inc. (A-OK) was a common carrier by motor vehicle, holding a certificate authorizing the transportation of freight in intrastate commerce issued by the Alabama Public Service Commission (APSC) under the State Motor Carrier Act.[2] The intrastate certificate was registered with the ICC under Section 206(a)(7)(A) of the Federal Motor Carrier Act which permitted the transportation of interstate freight over the routes or within the area authorized by the state certificate only so long as the holder is a carrier "engaged solely within a single state". The interstate operations under such "certificates of registration" are regarded as an incident to the carrier's intrastate operations. A-OK was adjudged a bankrupt on November 7, 1970. The Trustee offered the operating rights for sale and proposed to divide the certificate among four multi-state carriers. Each sought to receive authority between Birmingham and their selected parts of Alabama. The Trustee entered into four separate but similar contracts, each being conditioned upon approval by the ICC and APSC.[3]

Since Section 206(a)(7)(A) precluded the transfer of a certificate of registration to a multi-state carrier from a carrier engaged in operations solely within a single state, the applicants filed a series of applications under an administrative approach first outlined in *C & D Motor De-*

2. Alabama Code references in this brief will refer to sections of Title 48 of the *1940 Code*, now § 37-3-1, et seq. of the *1975 Alabama Code*, unless otherwise specifically indicated. References to Federal statutes will refer to Sections of the Motor Carrier Act (49 U.S.C. § 301, et seq.) unless otherwise specifically indicated.

3. All notices were issued and all hearings were held on the basis of these contracts, so conditioned. Petitioners so admitted (Petitioners' Br. p. 4).

livery Co.—Purchase—Elliot, 38 M.C.C. 547 (1942), which, if approved, would permit the multi-state carrier to transfer the certificate of registration under Section 5 and certificate it under Section 207. In such cases, the Commission allowed such "directly related" Section 207 applications to be supported by the intrastate carrier's past operations to demonstrate the public need required by Section 207. As noted by the Fifth Circuit (A-11):

> "Thus, the burden of the applying transferee is made significantly less difficult and his chances of success in obtaining interstate authority are enhanced."

Absent the evidence of past operations of the single state transferor, the burden of meeting the statutory standard of proof of public convenience and necessity (PCN) under Section 207 admittedly was much greater.

In addition to the transfer applications filed with the APSC, each applicant filed with the ICC:

(1) An application under Section 5(2) seeking approval of the transfer of the part of the Alabama intrastate registered certificate proposed to be purchased;

(2) A Section 207 "directly related" application seeking to certificate that part of the intrastate registered certificate it was seeking to purchase; and

(3) An application under Section 210a(b) seeking temporary authority approval of a lease of the rights proposed to be acquired and certificated.

On October 30, 1972, following extensive hearings, the APSC issued an order denying the applications, finding and stating that (A-17-18):

> "When the proposed division of this authority is considered in conjunction with the authorities presently

> held by the applicants, and the tacking that would be possible, we are not being asked to approve the revival of A-OK's rights but to approve a major readjustment of the transportation industry of Alabama."

The Order of the APSC was affirmed by the unanimous decision of the Alabama Supreme Court in *Alabama Public Service Commission, et al.* v. *Cooper Transfer Company, Inc.*, decided December 18, 1975, rehearing denied February 5, 1976 295 Ala. 209, 326 So.2d 283.

On January 19, 1973, during pendency of the Alabama litigation, the Administrative Law Judge (ALJ) recommended approval of the Section 5 and directly related Section 207 applications conditioned and contingent on the provision that (A-68):

> "Prior to or concurrently with consummation of the transaction, furnish the Commission a certified copy of the state certificate as reissued to it, or if the Alabama Public Service Commission does not reissue the certificate, a certified copy of the order which approves the transfer of the intrastate certificate . . ."[4]

Exceptions of applicants and protestants were overruled by Order of Division 3 dated November 26, 1973, stating that (A-80):

> *". . . section 206(a)(7)(A) provides that certificates of registration 'may not be transferred apart from the transfer of the corresponding intrastate certificate' . . ."* (Emphasis supplied.)

While continuing the Alabama litigation, the applicants then filed their first petition for reconsideration seeking to amend the basic contracts on which the case

---

4. An identical condition was included in all four cases.

was tried.[5] The applicants sought to transfer the A-OK rights "embraced in the certificates of registration, apart from the underlying corresponding intrastate rights in Alabama".[6]

By Order served May 21, 1974 (A-82), Division 3 again declared that this could not be done and emphasized that (A-84):

> ". . . this Commission has consistently refused to sanction sale of rights embodied in a certificate of registration when the purchaser would not also acquire the corresponding intrastate authority, see *Cook Motor Lines, Inc.—Purchase (Portion)—Epperly Motor Freight, Inc.*, 116 M.C.C. 300, and hence the petitions must be denied in this respect . . ."

The applicants then filed petitions under Rule 101 (a)(4) for a finding of general transportation importance (GTI), which were denied by order dated June 28, 1976 (A-89-90). Under said Commission rule this decision rendered the administrative proceeding final.

Notwithstanding the finality of the prior orders, on March 27, 1975, the applicants filed their second petition for reconsideration, claiming that the applications should be approved on the basis of a decision of the Circuit Court of Covington County, Alabama, purporting to reverse the order of the APSC.[7] The Commission again rejected the

5. Being the contracts involved in the hearing and proceedings before the ICC and in the judicial review then being prosecuted by applicants in the Alabama courts. No hearing has been held on any other contract or proposal.

6. The same proposal was denied by orders of the Commission dated November 26, 1973 and May 21, 1974 (A-78, A-82).

7. The Circuit Court decision was subsequently reversed and the order of denial by the APSC was affirmed by unanimous decision of the Alabama Supreme Court. *Alabama Public Service Commission, et al.* v. *Cooper Transfer Company, Inc., et al.*, 295 Ala. 209, 326 So.2d 283.

applicants' attempts to circumvent its orders and the Act of Congress and again declared that "this Commission has consistently refused to sanction" the sale of the interstate registered certificates apart from the intrastate certificate upon which the registration was based (A-88).

Following the unanimous decision of the Alabama Supreme Court, the applicants filed their *third* petition for reconsideration based on a *new* proposal and amended contracts to surrender and cancel the Alabama certificate and the intrastate certificates of registration sought to be transferred under Section 5, and to have Division 3 issue certificates to each of the petitioners under Section 207 applications which were "directly related" to the Section 5 applications.

Without further notice, the Commission reversed its prior orders of November 26, 1973 (A-80), May 21, 1974 (A-84), June 28, 1974 (A-90), and June 6, 1975 (A-88), and approved the new proposals. Thereupon, the protestants (respondents here) sought judicial review. In *North Alabama Express, Inc., et al.* v. *United States and I.C.C.*, 576 F.2d 679, extended 583 F.2d 779 (A-1-20), the Fifth Circuit considered the legislative history of the controlling statute, discussed all issues involved, and held that the statute (49 U.S.C. § 306(a)(7)(A)) means what it says, that a certificate of registration "may not be transferred apart from the transfer of the corresponding intrastate certificate", that an applicant cannot meet the statutory standard of Section 207 requiring proof of "the present or future public convenience and necessity" by application of an admittedly reduced and lesser standard confined to "directly related applications" and that:

> "Division 3 exceeded its authority when it reversed its prior rulings and approved the purchase carriers newly transmuted and 'unrelated' Section 207 applications."

This decision of the Fifth Circuit followed four prior decisions of Division 3 *in this case* and the multiple Commission and Court decisions cited by the Court (A-13, Fn. 9, 16-17).

Under Section 17(4) of the Interstate Commerce Act, a division of the Commission has authority only with respect "to any work, business or function assigned or referred thereto . . .". The Fifth Circuit correctly noted and quoted from *Hart* v. *Interstate Commerce Commission*, 226 F.Supp. 635, 643 (D. Minn. 1964), that (A-16):

> "Division 3 can only consider Sec. 207 applications which are 'directly related' to Section 5(2) applications for purchases, consolidations, etc."

The Fifth Circuit also noted that (A-17):

> "We do not reach the questions concerning the sufficiency of notice and whether the evidence is sufficient to support an 'unrelated' application if the testimony taken under the Elliott Doctrine were eliminated. Our decision makes such further inquiry inappropriate. On their face, however, the procedures of Division 3, including its hindsight weighing of the evidence and its mutation of the issues from those noticed, unnecessarily present problems of serious magnitude."

As noted, the order of Division 3 was based on a new factual situation and contracts different from those noted and on which the hearings were held. In fact, Division 3 stated that the ultimate proposals were "substantively different" (A-101) from those originally considered and noticed.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

The Act and prior Commission decisions support the decision of the Fifth Circuit. The petitioners here sought transfer of a certificate of registration issued under Section 206(a)(7)(A) to authorize the transfer of interstate freight commensurate with the intrastate certificate upon which the registration was based. The petitioners argue that their cancellation of the Alabama intrastate certificate satisfied this statutory requirement and that cancellation of A-OK's certificate avoided the evil Congress sought to prevent when it adopted the 1962 amendments which now appear in Section 206(a)(7)(A) and Section 206(a)(6) (A-13, 576 F.2d 684).

The statute (49 U.S.C. § 306(a)(7)(A)) specifically provides that the certificate of registration:

> "May not be transferred apart from the transfer of the corresponding intrastate certificate."

On three occasions *in this case* Division 3 affirmed that the statute meant just what it plainly says. On November 26, 1973, Division 3 stated (A-80):

> "Section 206(a)(7)(A) provides that certificates of registration 'may not be transferred apart from the transfer of the corresponding intrastate certificate'."

On May 21, 1974, Division 3 exposited (A-84):

> ". . . this Commission has consistently refused to sanction sale of rights embodied in a certificate of registration when the purchaser would not also acquire the corresponding intrastate authority, see *Cook Motor Lines, Inc.—Purchase (Portion)—Epperly Motor Freight, Inc.*, 116 M.C.C. 300. . ."

On June 6, 1975, Division 3 reiterated (A-88):

> ". . . this Commission has consistently refused to sanction such sales, see *Cook Motor Lines, Inc.—Purchase (Portion)—Epperly Motor Freight, Inc.*, 116 M.C.C. 300 . . . "

Additionally, legislative history supports the Fifth Circuit decision. House Report 1090 which reported out the 1962 amendments to the House of Representatives stated:[8]

> "Under both paragraphs (6) and (7) which would be added to Section 206(a) of the Interstate Commerce Act by the bill, certificates of registration issued by the Interstate Commerce Commission would be transferable subject to the limitations contained in Section 5 of the Interstate Commerce Act dealing with carrier unifications and mergers, *but they could not be transferred apart from the intrastate rights.* A transfer of intrastate rights without a corresponding transfer of the certificate of registration would void the interstate rights." (Emphasis supplied.)

In a letter to Hon. Oren Harris, Chairman of the House Committee on Interstate and Foreign Commerce, dated July 31, 1961, the ICC, through Hon. Everett Hutchinson, stated that the certificate of registration:

> ". . . could not be transferred apart from the intrastate rights. A transfer of the intrastate rights without a corresponding transfer of the certificate of registration would void the interstate rights. *In addition, any subsequent termination of or restriction in the scope of the intrastate certificate would similarly restrict the interstate rights.*" (Emphasis supplied.)

8. See U. S. Code, *Congressional and Administrative News*, p. 3165, P. L. 87-805, 76 Stat. 911.

In its letter to Congress in connection with consideration of the amendments, the Commission added that under Section 206(a)(6):

> "The certificate would be transferable subject to the restrictions respecting the separation of the interstate and the intrastate rights."[9]

It is important to note that at the time of the enactment of the 1962 amendments, Congress specifically and emphatically rejected the so-called "Sisk Amendment" that would have continued in force the rights contained in a certificate of registration after termination or alteration by the State of the underlying State certificate, unless or until the Commission initiated a special proceeding to also terminate the certificate of registration.[10]

The decision of the Fifth Circuit also is in accord with prior administrative and judicial decisions (See A-13, including Fn. 9, 14-17).

Additionally, the applicants had available and could have long since concluded Section 207 applications (favorably or unfavorably) if they had not persisted in their efforts to pursue the reduced burden and standards applied to "directly related" applications.

The petitioner's argument that the subject decision confers on State regulatory commissions authority to nullify a decision of the Commission relating to transfer of a registered certificate neglects to note that:

> —The registered certificate exists solely by reason and "as an incident to the carrier's intrastate operations".

9. See U. S. Code, *Congressional and Administrative News*, 1962, Vol. 2, pages 3165-3172.

10. See Remarks of Mr. Harris, Floor Leader in the House of Representatives, Congressional Record, Vol. 108, Part 15, p. 20585.

—Section 206(a)(7)(A) specifically provides that the certificate of registration "may not be transferred apart from the transfer of the corresponding intrastate certificate".

—The legislative history and prior Commission and judicial decisions confirm that Sections 206(a)(6) and 206(a)(7)(A) prohibit transfer of a certificate of registration "apart from the transfer of the intrastate certificate".

—The petitioners have readily available to them the right to file a Section 207 application and to meet the statutory standards instead of persisting in efforts to evade that standard by pursuing a "directly related" application where the proof admittedly is reduced and a different standard applied.

The Fifth Circuit correctly held that Division 3 did not have authority to grant a Section 207 application "directly related" to a Section 5 application where

—The certificate of registration could not lawfully be transferred.

—The standard of proof in a "directly related" application was different from the standards applied to other Section 207 applications.

—The contracts, applications, notice and hearing were all based upon a proposal which the Commission stated was "substantively different" (A-101) and no notice was given and no hearing was held on the "substantively different" proposals.

I

The Decision Affirms What Section 206(a)(7)(A) Provides That an Interstate Certificate of Registration "May Not Be Transferred Apart From the Transfer of the Corresponding Intrastate Certificate" and That Applicants Cannot Evade the Requirements of Section 207 Without a "Directly Related" Application.

Directly contrary to the petitioner's argument, the decision of the Fifth Circuit does not impinge upon the Commission granting the petitioner's interstate operating authority. In fact, the case was remanded "with instructions that Division 3's order now under review be vacated and set aside—without prejudice to further proceedings not inconsistent with this opinion" (A-20).

In *Navajo Freight Lines, Inc.* v. *United States,* 263 F.Supp. 438 (D.C. Cal. 1967), which the petitioner erroneously described as "the only other decision arising under the 1962 amendment"[11] (Br. p. 13), the Three-Judge Court stated that the 1962 amendment to Section 306 provided:

> "The 'certificate of registration' is transferable within the limitations provided in 49 U.S.C.A. Section 5 and 49 U.S.C.A. Section 306. *It may not be transferred apart from the intrastate certificate which supports it, and if the intrastate certificate is transferred apart from the certificate of registration, the right to engage in interstate commerce is destroyed.*" (Emphasis supplied.)

---

11. Cases decided directly relating to 49 U.S.C. § 306(a)(7)(A) include *Valley Express, Inc.* v. *United States,* 264 F.Supp 1006 (W.D. Wisc. 1966); *Consolidated Freightways Corp. of Del.* v. *United States,* 279 F.Supp. 111 (E.D. Idaho 1968); *A-OK Motor Lines* v. *United States,* 287 F.Supp. 828 (N.D. Ala. 1968); *Homer White, Inc.* v. *United States,* 281 F.Supp. 436 (W.D. N.Y. 1968).

The Court further stated that the 1962 amendment restricted "the transfer of the new certificate of registration without the intrastate certificate".

The reliance of petitioner on *County of Marin* v. *United States*, 356 U.S. 412, 2 L.Ed.2d 879, 78 S.Ct. 880, is misplaced. That decision involved an application by Pacific Greyhound under Section 5(2) to transfer its passenger bus operations in the San Francisco Bay area to a wholly owned subsidiary "in the hope of escaping certain (rate) practices of the state commission". The Supreme Court held that the proposed subsidiary "can by no means be deemed a carrier". As in *Marin* the decision of the Fifth Circuit "does not create a vacuum in regulation". All the petitioner has to do is publish notice of a Section 207 application or file a Section 207 application and satisfy the statutory standards of proof. It is just that simple and a great deal less expensive and time consuming than to try to evade that statutory standard.

We do not read *Marin* to hold or infer that Federal jurisdiction would be assumed "to the complete ouster of state jurisdiction". In fact, the Court specifically declined to do so. If any Federal-State relationship is here involved, the Court in *Marin* noted:

> "The Commission practices as evidenced by these cases is, in our opinion, insufficient to outweigh the apparent congressional purpose and the clear language of the statute . . . especially in this delicate area where the sustaining of federal jurisdiction leads, by statute, to the complete ouster of state authority."

Here the registered certificate is "an incident to the intrastate certificate". The statute (49 U.S.C. Section 306) specifically provides that the certificate of registration "may not be transferred apart from the corresponding

intrastate certificate", and the applicants have readily available 49 U.S.C. Section 307 to establish any need for authority.

Division 3 Can Only Consider Section 207 Applications Which Are "Directly Related" to Section 5(2) Applications for Purchases

In their final amended proposals (without notice or hearing), the petitioner proposed cancellation of the intrastate certificate and the certification of the "directly related" Section 207 application. The Fifth Circuit correctly stated:

> "Division 3 exceeded its authority when it reversed its prior rulings and approved the purchasing carriers' newly transmuted and 'unrelated' Section 207 applications. Division 3 lacks authority to decide Section 207 applications where they are not 'directly related' to a Section 5 transfer application."

The Fifth Circuit cited *Hart* v. *I.C.C.*, 226 F.Supp. 635, 643 (D. Minn. 1964) to the same effect.

It is important to note and remember that this case does not involve the proposed transfer of an interstate certificate where the question of PCN has been determined by the Commission, but it relates to the issuance of a certificate based in whole or in substantial part on operations conducted under a certificate of registration where there was no proof of any need for interstate operations except as they were indicated by the intrastate operations.

Neither the courts nor the Commission agree with the petitioner's argument that Section 17(4) would give Division 3 jurisdiction to determine an issue of PCN not "directly related" to a Section 5 application. In fact, no

division would have authority to grant a certificate on an amended contract, and an amended application "substantively different" from the original proposal without any notice or hearing. *Port Terminal R.R. Ass'n* v. *United States,* 551 F.2d 1336 (5th Cir. 1977); *Ringsby Truck Lines, Inc.* v. *United States,* 263 F.Supp. 552; *General Increase-Transcontinental,* 319 I.C.C. 792; *Eddleman* v. *United States,* 119 F.Supp. 231; *Matlack, Inc.* v. *United States,* 119 F.Supp. 617.

The separate divisions of the Commission have jurisdiction only of those matters appropriately assigned to them by the Commission. If a division could arrogate to itself powers not specifically assigned, three members could effectively make Commission policy contrary to the statute and Congressional intention.

Baggett Transportation Company v. *United States,* 116 F.Supp. 167 (N.D. Ala. 1953) involved review of an order of the Commission approving the transfer of a certificate registered under the old proviso of Section 206(a) of the Act before the 1962 amendments. The nature of the proceeding was properly noticed. The Court stated that:

> "The main thrust of plaintiff's argument is against the jurisdiction of the Commission under Section 5 of the Act to entertain an application by a multiple state certificated carrier for authority to purchase the properties of a single state carrier operating under the second proviso of Section 206(a)."

The Commission had assigned "finance applications to Division 4" and PCN applications to Division 5. Division 4 heard the finance and "directly related" PCN applications under the Elliott Doctrine which the Court cited. That case is readily distinguishable from the subject proceeding because in *Baggett* the *purchase and* the Section 207 applications were approved.

In *Hart* v. *I.C.C.,* 226 F.Supp. 635, 643 (D. Minn. 1964), the Court specifically stated and held:

> "Without a Section 5(2) application to decide Division 3 would exceed its responsibility if it decided a Section 207(a) application."

II

The Notice and All Hearings and Evidence in This Case Were Directed to a "Directly Related" Application Specifically Conditioned on Approval of the Transfer of the ICC and APSC Certificates. The Commission Could Not Lawfully Proceed With a "Substantively Different" Proposal Without Notice and Hearing.

We have previously stated that not one word of evidence was taken in this proceeding that was not "directly related" to the Section 5 application where standards admittedly different from a usual Section 207 application applies. The petitioner is wrong in stating that "no one has challenged the substantiality of the ALJ's findings" of PCN. Each of the protestants took the position throughout this proceeding that approval would seriously and adversely affect their operations. The petitioner is wrong again when he argues that the Court would have affirmed the case if the alleged findings of PCN had been adopted by Division 1. First, if any finding had been made by Division 1 it would have been under the application of completely different standards and it would not be a "directly related" application where the ALJ and Commission relied upon evidence of past operations as proof of PCN (A-66). Second, all parties would have had notice that a Section 207 "unrelated" application was to be considered and the hearing would have been conducted on that basis.

As the Fifth Circuit observed, the Commission's "mutation of issues from those noticed unnecessarily present problems of serious magnitude". How could the adoption of any findings by any Division excuse the "mutation of issues from those noticed"? How could Division 1 issue an order on a case heard by Division 3? Merely to state the propositions is to demonstrate their absurdity.

We agree with petitioner's argument (Br. p. 17, Fn. 22) that the Act makes no distinction between a "directly related" PCN application and one that is "unrelated". But the petitioner avoids noting that the Commission has historically applied different standards. The ALJ stated (A-66), and the Fifth Circuit correctly noted that:

> "Under the so-called Elliott Doctrine such a 'directly related' section 207 application may be supported by the intrastate carrier's past record to demonstrate that the present or future public convenience and necessity will be served by authorizing the interstate carrier to operate the routes. Thus the burden on the applying transferee is made significantly less difficult and his chances of success in obtaining interstate authority are enhanced."

The *Elliott* Doctrine has been uniformly applied by the Commission and judicially approved.

When the entire Commission voted on this case, it found "no issue of general transportation importance"[12] (A-90) and thereby further affirmed the order of the Commission (A-84) that:

> "This Commission has consistently refused to sanction the sale of rights embodied in a certificate of registration when the purchaser would not also acquire the

12. Much less the national importance that would justify this Court taking jurisdiction.

> corresponding intrastate authority, see *Cook Motor Lines, Inc.—Purchase (Portion)—Epperly Motor Freight, Inc.*, 116 M.C.C. 300. . ."

This application has been pending for a considerable period of time, due almost entirely to the efforts of the petitioner to obtain operating authority without an "unrelated" Section 207 application. Such an application could have been resolved long ago. In his effort to avoid meeting the standards of Section 207, the petitioner filed three petitions for reconsideration—although Commission rules provide for only one. He filed a petition for general transportation importance. He appealed from the order of the APSC and now urges the subject petition after the issues have been judicially determined by the Alabama Supreme Court and the Fifth Circuit Court of Appelas.

CONCLUSION

We respectfully submit the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied and this litigation brought to an end.

Respectfully submitted,

MAURICE F. BISHOP
BISHOP, SWEENEY & COLVIN
601-09 Frank Nelson Building
Birmingham, Alabama 35203
Tel. 205 251-2881
Counsel for Respondents

Dated: February 28, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY),
Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

PHINEAS STEVENS
RHESA H. BARKSDALE
17th Floor, Deposit Guaranty Plaza
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Petitioner

Of Counsel:
BUTLER, SNOW, O'MARA, STEVENS & CANNADA
17th Floor, Deposit Guaranty Plaza
Post Office Box 22567
Jackson, Mississippi 39205

Dated: March 6, 1979

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY),

Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

A brief response to respondents' "Reply to Petition for Writ of Certiorari" is necessary in view of certain statements set forth therein.

On page 6 respondents refer to the June 28, 1976 order entered by the entire Interstate Commerce Commission, and state that the rendition of such order "rendered the administrative proceeding final."[1] This is not correct. Such order expressly provided:

---

1. Counsel for respondents made the same erroneous statement in closing oral argument before the court below, and subsequently corrected such error by letter to the court dated January 31, 1978.

> "*It is ordered*, That the said petitions be, and they are hereby denied, without prejudice to the future filing of such petitions as may be appropriate." (A90).

On page 7 respondents state that the ICC's final order, which "reversed"[2] its prior orders, was issued "[w]ithout further notice." This is not correct. Respondents had actual notice of the applicants' request for approval of their amended applications and filed a brief in opposition thereto.

On page 15 respondents state that this case does not involve a situation "where the question of PCN has been determined by the Commission," and that "there was no proof of any need for interstate operations except as they were indicated by the intrastate operations." Neither statement is correct. The Commission found that approval of each application under §207 of the Act was required by "the present and future public convenience and necessity."(A68, A70, A72, A73, A106). That finding was supported by evidence presented by 62 shipper witnesses and 5 connecting motor carriers. The Administrative Law Judge, after making detailed findings of fact concerning the testimony of such witnesses, concluded that "the testimony of numerous shipper witnesses supports the conclusion that the proposals of the vendees will be responsive to a public need." (A66). These findings were adopted and affirmed by the Commission (A106).

---

2. The ICC did not "reverse its prior orders." The prior orders dealt with the applications *as originally filed*. The order under review dealt with the applicants' *amended* proposal—a proposal correctly characterized by respondents (p. 7) as "a *new* proposal," which "was based on a new factual situation." (p. 8).

Throughout their brief, respondents raise the question of the adequacy of notice of the Commission's action.[3] The Court below clearly stated that:

> "We do not reach the questions concerning the sufficiency of notice and whether the evidence is sufficient to support an 'unrelated' application if the testimony taken under the Elliott Doctrine were eliminated. Our decision makes such further inquiry inappropriate." (A17).[4]

Therefore, no question of notice is involved. If it were, respondents would have no standing to raise such question since they had actual notice of and actively participated in every stage of the proceeding.

Respondents also suggest that they were prejudiced because no further hearing was held after the applicants amended their proposal before the Commission.[5] Respondents made no request for a further hearing. The applicants, on the other hand, did request that a further hearing be held if the Commission deemed such a hearing necessary. Respondents *opposed* that request.

If lack of proper notice or further hearing constituted an infirmity in the Commission proceedings, the court should have remanded the proceeding with instructions to provide such notice or conduct such hearing. Instead, the court remanded the case "with instructions that Division 3's order now under review be vacated and set aside." (A20).

---

3. See, *e.g.*, pp. 12, 15, 16, 17.

4. This quotation also appears on page 8 of the respondents' brief.

5. See, *e.g.*, pp. 6 (n.5), 12, 15, 16, 17.

The judgment and opinions of the court below should be reviewed by this Court.

Respectfully submitted,

PHINEAS STEVENS
RHESA H. BARKSDALE
17th Floor, Deposit Guaranty Plaza
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Petitioner

Date: March 6, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY),

Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF DISCUSSING NEW ICC DECISION IN THIS CASE

PHINEAS STEVENS
RHESA H. BARKSDALE
17th Floor, Deposit Guaranty Plaza
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Petitioner

Of Counsel:
BUTLER, SNOW, O'MARA, STEVENS & CANNADA
17th Floor, Deposit Guaranty Plaza
Post Office Box 22567
Jackson, Mississippi 39205

Dated: March 16, 1979

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY),
Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,
Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF DISCUSSING NEW ICC DECISION IN THIS CASE

This proceeding seeks review of a decision of the Court of Appeals, Fifth Circuit, which reversed and remanded an order of the Interstate Commerce Commission (ICC). On page 5 (n. 7) of the petition for writ of certiorari it was explained that "the ICC has withheld further proceedings pending final disposition of the court proceedings." That statement is no longer accurate. On March 12, 1979 counsel for petitioner received a further decision by the ICC in this proceeding.[1] A copy of this decision, dated February 5, 1979, and mailed March 5, 1979, is attached as Appendix D.

1. Counsel, on that date, sent by express mail a letter to the Clerk reporting the issuance of such decision. It was suggested by the Clerk that this Supplemental Brief would be appropriate under Rule 24.5.

This new decision, scheduled to become effective April 4, 1979,[2] purports to comply with the mandate of the Court of Appeals.

The ICC's action in implementation of the court's mandate makes it all the more imperative that this Court review the decision of the Court of Appeals in this proceeding.

Following the July 17, 1978 decision of the Court of Appeals, the ICC, *sua sponte*, entered decisions, dated August 21, 1978, designed to comply with the court's decision, which required the Commission's Division 3 to enter an order *dismissing* these proceedings. Since the August 21 action by the ICC was taken prior to the issuance of the court's mandate and prior to the disposition of the petition seeking rehearing before such court, petitioner filed appropriate pleadings with the ICC requesting (1) a stay of the August 21 decisions and (2) an extension of time in which to file a petition for reconsideration of such decisions. The ICC granted the stay but required petitioner to proceed with the filing of its petition for reconsideration. Petitioner understood that the ICC would then take no further action while this proceeding was pending before this Court.[3]

The ICC was promptly notified of the November 6 decision of the Court of Appeals, modifying its July 17 decision. In its recent decision, however, the ICC has taken the position that the court's November 6 modification was of no significance. As a result of this interpretation,

2. Petitioner is filing a request with the ICC to postpone the effective date of such order, pending disposition of this proceeding before this Court.

3. The ICC has explained the issuance of its latest decision by stating that it is "not at liberty to postpone any further our compliance with the mandate of the Fifth Circuit." (Appendix D, p. 14).

the Commission has reinstated its decisions of August 21 *dismissing* these proceedings in compliance with the court's July 17 ruling.

The ICC has correctly noted that the "controlling issue" in the court's decision was the conclusion that the Commission's Division 3 "lacked authority" to enter its findings that public convenience and necessity required the issuance of certificates to the bankrupt carrier's successors. The ICC's discussion of this issue points up a significant error in the court's decision. The ICC stated:

> "The Court concluded that as a result of the Alabama Public Service Commission's cancellation of A-OK's intrastate authority, no interstate authority under a certificate of registration could survive." (Appendix D, p. 13).

The fact is, however, that the ICC entered its final order approving the issuance of interstate authority to A-OK's successors several months *prior* to the cancellation by the state commission of A-OK's intrastate authority. The ICC is here recognizing that, under the court's decision, the *subsequent* Alabama Public Service Commission order cancelling A-OK's intrastate rights invalidated the purely interstate authority *previously* granted by the ICC (based upon its findings that PCN required the continuation of interstate operations).

This demonstrates that the court's decision stands for the proposition that a state regulatory commission can nullify and cause to be set aside a finding by the ICC, under §207[4] of the Interstate Commerce Act, that purely interstate operations are needed in the public interest.

4. As explained in the petition (n. 3), statutory references are to the Interstate Commerce Act in effect at the time of the court's decision.

Petitioner also invites the Court's attention to the following findings in the ICC's decision:

> "We have sympathy with the Trustee's request that the Commission, if it must[5] dismiss all the present applications, at least restore the vendor's Certificate of Registration. Such Certificate was surrendered voluntarily pursuant to the earlier August 12, 1976, decision of Division 3. However this certificate cannot be reissued to vendor because the underlying intrastate authority upon which it was based has been cancelled. The Court's decision in this case emphasizes that registered authority cannot exist without concurrent underlying intrastate single-state authority. Section 206(a)(7)(A) of the Interstate Commerce Act, 49 U.S.C. Section 10932(b)(3), formerly contained in 49 U.S.C. Section 306(a)(7)(A)." (Appendix D, p. 14).

In implementation of the court's decision, the ICC is now holding that *because* the Trustee in Bankruptcy complied fully with the ICC's order, the trustee has thereby lost forever the only major asset owned by the bankrupt. In setting aside its grant of authority to A-OK's successors, the ICC has now held that the state commission has rendered the ICC powerless to reinstate the status quo that existed prior to the entry of the invalidated order. Accordingly, *because* the trustee complied with the ICC's order,[6]

5. The sole purpose of the court's November 6 decision was to eliminate its original requirement that the ICC "must" dismiss such applications.

6. The trustee acted pursuant to an order of the Bankruptcy Court. Such order, in turn, was issued for the purpose of complying with the conditions prescribed by the ICC (Petition, pp. 7-8). Invalidation of the ICC's order should leave the parties in the position they were in immediately prior to entry of such order. This would then enable the trustee to recontract for the sale of the bankrupt's operating authority under conditions that would be fully consistent with the court's decision and acceptable to all parties.

the ICC now says that the trustee *thereby* lost all of its operating authority. Under this decision, neither A-OK nor A-OK's successors will be authorized to continue the common carrier interstate services that have been maintained continuously for several decades.[7] This unconscionable result is directly attributable to the errors of the Court of Appeals, as set forth in the petition.

The rendition of this new decision of the ICC makes it even more imperative that this Court review the decision of the Court of Appeals. Otherwise, the ICC will no longer be able to exercise the "exclusive and plenary" jurisdiction conferred upon it by § 5(12) of the Interstate Commerce Act, as recognized by this Court in *County of Marin* (Petition, pp. 12-14). No longer will each division of the ICC be authorized to "hear and determine" all matters referred to it by the Commission or exercise in regard thereto "all the jurisdiction and powers conferred by law upon the Commission," as expressly provided by § 17(4) of the statute.

Respectfully submitted,

PHINEAS STEVENS
RHESA H. BARKSDALE
17th Floor, Deposit Guaranty Plaza
Post Office Box 22567
Jackson, Mississippi 39205
Counsel for Petitioner

Date: March 16, 1979

7. The ICC's findings of PCN, based upon the testimony of 62 shippers and 5 connecting motor carriers, are thereby nullified—all as the result of the court's holding that the state commission's decision (dealing only with local, intrastate matters) was controlling.

APPENDIX

APPENDIX D

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-F-11133[1]

RELIABLE TRUCK LINES, INC.-PURCHASE (PORTION)-A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY)

DECIDED February 9, 1979

These applications were originally approved and authorized by a report and order of the Commission's Division 3 entered August 12, 1976.

By a decision of the entire Commission on August 21, 1978, and served August 28, 1978 the proceeding was reopened and assigned to Division 3 for disposition in accordance with the opinion of the U.S. Court of Appeals for the Fifth Circuit in *North Alabama Express, Inc., Et Al.* v. *United States, Et Al.*, No. 77-1341 (reported at 576 F. 2d 679).

---

1. This proceeding also embraces Docket Nos. MC-128944 (Sub-No. 9), *Reliable Truck Lines, Inc., Extension-Alabama;* MC-F-11134, *Cooper Transfer Co., Inc.-Purchase (Portion)-A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy)*; MC-55889 (Sub-No. 39), *Cooper Transfer Co., Inc., Extension-Alabama;* MC-F-11143, *Gordons Transports, Inc.-Purchase (Portion)-A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy)*; MC-11220 (Sub-No. 123), *Gordons Transports, Inc., Extension-Alabama;* MC-F-11150, *The Mason and Dixon Lines, Inc., Purchase (Portion)-A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy)*; and MC-59583 (Sub-No. 130), *The Mason and Dixon Lines, Inc., Extension-Alabama.*

By a concurrent decision entered August 21, 1978 and served August 28, 1978, Division 3 dismissed the Section 5(2) and "directly related" Section 207 applications without prejudice to applicants' filing appropriate new applications for corresponding temporary and/or permanent operating authority under Section 210a(a) and 207 of the Act. Both decisions were entered to comply with the July 17, 1978 opinion of the U.S. Court of Appeals for the Fifth Circuit in *North Alabama Express, Inc., Et Al.* v. *United States, Et Al.*, No. 77-1341. That decision stated that certificates of registration can not be transferred if the underlying intrastate certificates had been cancelled. Accordingly, Division 3 had no authority under the Commission's own organizational structure at that time to consider the Section 207 applications since they were not "directly related" to a valid proposal under Section 5(2) - the only circumstance under which Division 3 could consider Section 207 applications.

On August 30, 1978, A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy) (Trustee) filed before the Court a petition for rehearing.

On September 19, 1978, the Commission, by Chairman O'Neal, entered a decision postponing the effective dates of the earlier decisions entered August 21, 1978, and served August 28, 1978, until 15 days after issuance of the Court's mandate. Chairman O'Neal's decision also maintained the existing due dates for the filing of petitions for reconsideration and replies relative to the August 21, decision. The parties were advised that a decision on such petitions would be held in abeyance until the petition for rehearing for the court was decided and its mandate issued.

On November 6, 1978, the Court denied the petition for rehearing, and it issued its mandate on November 14, 1978. Accordingly, the August 21, 1978 decisions were due to become effective on November 29, 1978.

However, on November 22, 1978, the Commission, by Chairman O'Neal, entered a decision, served November 28, 1978, further postponing the effective dates of the decisions of August 21. The effective date was suspended pending disposition of a petition by the Trustee, filed November 20, 1978, seeking implementation of the November 6, 1978, mandate of the United States Court of Appeals. This decision also preserved the right of AAA Cooper Transportation (ACT) and Mason & Dixon Lines Incorporated (M&D) to renew their requests for further postponement of the effective dates of the August 21 decisions, following disposition by the Commission of the Trustee's November 20 filed petition, described below. (These carriers will seek further postponement, if needed to carry on existing operations until their section 210a(a) temporary authority applications, prompted by the Court's decision, are decided.)

A number of pleadings have been filed by the parties and have been disposed of by the above-described decisions of September 19 and November 22 as well as by a Notice to the Parties, entered September 25, 1978, and served October 13, 1978. The following petitions remain and will be discussed:

By petition filed September 27, 1978, vendor's Trustee seeks reconsideration of the decisions of the entire Commission and of Division 3, entered August 21, 1978, and served August 28, 1978. On October 11, 1978, Bee-Line Express, Inc., Bowman Transportation, Inc., Floyd & Beasley Transfer Company, Inc., Georgia-Florida-Alabama Transportation Company and North Alabama Express, Inc., filed a joint reply.

By petition filed November 20, 1978, the Trustee seeks implementation by the Commission of the November 6,

1978, decision of the United States Court of Appeals which modified the earlier decision of that Court entered July 17, 1978. On November 24, 1978, the parties which filed the above-noted reply of October 11, 1978, also filed a motion to strike and a new reply to the petition of November 20th. The Trustee also has filed a reply to the motion to strike.

The contentions of the Trustee presented in the September 27th filed petition are twofold: (1) that the August 21 decisions of the Commission and of the Commission, Division 3 were inappropriate inasmuch as the Court had not yet issued its mandate; and (2) that in any event the decision of Division 3 dismissing the applications in these proceedings improperly failed to restore to the Trustee its Certificate of Registration and Certificates of intrastate operating rights in existence prior to the earlier decision of Division 3, entered August 12, 1976 (reported at 122 M.C.C. 501). These Certificates were surrendered respectively to the Commission and to the Alabama Public Utilities Commission in reliance on and in specific compliance with the Commission's order of August 12, 1976.

The contentions of the Trustee presented in the November 20, 1978, petition seeking implementation, essentially are grounded on its belief that the November 6 order of the Court effected a substantial modification of the Court's July 17 decision. That order substituted the following language:

> "The case is now remanded to the Interstate Commerce Commission with instructions that Division 3's order now under review be vacated and set aside (footnote). Such action is without prejudice to further proceedings not inconsistent with this opinion." (The Court's footnote made specific reference to the restructuring by the Commission of its divisions (42 FR 65181 (December 30, 1977), providing for two divisions with concurrent general jurisdiction.)

for this language in the prior decision:

> "Division 3's order now under review is due to be vacated and set aside and the case remanded to the Interstate Commerce Commission for dismissal by that division. Such action is without prejudice to consideration of appropriate PC&N applications by Division 1 of the Commission."

The Trustee claims that the Court's decision as modified simply directs the Commission to vacate and set aside the order of Division 3, entered August 12, 1976, and does not require dismissal of the entire proceeding, but rather would permit the Commission to continue processing the "related" Section 207 applications as "unrelated" independent Section 207 applications following appropriate republication of notice. Accordingly, the Trustee requests that the August 21 dated decisions of the Commission be withdrawn as they apply only to implementation of the Court's decision of July 17, 1978, prior to modification. He also asks the Commission to temporarily withhold any further action pending disposition of a petition seeking a writ of certiorari to be filed with the United States Supreme Court to review the above-decisions of the Court of Appeals. However, the trustee argues, if such action is not withheld, the Commission should proceed (1) to vacate and set aside Division 3's decision of August 12, 1976; (2) restore to the Trustee vendor's Certificate of Registration; and (3) process the PC&N applications in this proceeding as independent Section 207 applications rather than as applications under Section 207 directly related to section 5 proceedings,

following notice to this effect in the Federal Register and the submission of additional evidence.

Protestants' joint replies and motion to strike generally support Commission action taken subsequent to the Court's decision. They urge denials of the Trustee's petitions or alternately, denial of the first and striking of the second. As indicated below, there is no compelling reason for granting the motion to strike.

DISCUSSION AND CONCLUSIONS

The Trustee's petitions raise interrelated issues and, for the most part, will be discussed together. However, the initial contention in the first petition that entry of the Commission's August 21 decisions was premature is now mooted. By Chairman O'Neal's decision of October 19, 1978, the decisions of August 21 were not to become effective before the Court's mandate was finally issued.[2] The time frame for filing of petitions for reconsideration and replies was left unchanged to effect expeditious disposition of this case in accordance with the Court's judgment.

In our opinion, the Court's subsequent November 6, 1978 order, did not effect a substantial change in its earlier opinion as would require or justify withdrawal or alteration of the August 21 decisions. It is true that the Court's ultimate decision remanding the case to the Commission does not expressly require dismissal of the proceedings. The Commission was charged only with vacating and setting aside the order of Division 3, entered August 12, 1976 "without prejudice to further proceedings not inconsistent with this opinion."

---

2. The decisions are yet to be effective as a result of decision of the Commission, by Chairman O'Neal, dated November 22, 1978 extending the effective date.

However, the controlling issue in the Court's decision was whether (former) Division 3 had authority to approve a "directly-related" Section 207 application, when it was no longer related to a Section 5(2) proceeding. The Court concluded that as a result of the Alabama Public Service Commission's cancellation of A-OK's intrastate authority, no interstate authority under a certificate of registration could survive. Hence there were no property rights to transfer under Section 5(2) and without a viable Section 5(2) application to decide, Division 3 exceeded its authority in deciding the assertedly "directedly related" Section 207 applications (576 F. 2d 679 at 686).

Thus although the November 6 order eliminated the specific directive of "dismissal (of the case) by that Division (Division 3)" and directed the Commission to vacate and set aside that Division's order of August 12, 1976, the Court's decision, even as slightly modified, leaves the Commission with no choice but to dismiss the Section 5(2) applications.

Clearly, however, that Court was primarily concerned with the Commission's new Organization Minutes referred to in the above-described footnote. But the prior specific order could be, and, in fact, was accommodated by the Commission through Delegation to Division 3, 49 C.F.R. 1011.2 (a)(6)(B) and 49 C.F.R. 1011.3(h). See our decision of August 21, 1978, in these proceedings.

Although Division 3's decision of August 12, 1976, was implicitly vacated and set aside by its later decision of August 21, 1978, dismissing these proceedings, our decision herein shall expressly vacate and set aside the August 12 in keeping with the Court's express instructions. Beyond that, the Court's judgment directs the Commission to act in a manner "not inconsistent with this opinion". This is exactly what it has done.

The Court's judgment does give the Commission some flexibility as to the timing and manner of disposition of the "directly-related" Section 207 applications. Thus the Commission could entertain a request to treat the Section 207 applications as new (independent) Section 207 applications, republish them as such, and set the matter for further hearing. But no Section 207 applicant has made such a request. Moreover the record is quite stale and we believe that the matter can best be handled in new Section 207 proceedings.

We have sympathy with the Trustee's request that the Commission, if it must dismiss all the present applications, at least restore the vendor's Certificate of Registration. Such Certificate was surrendered voluntarily pursuant to the earlier August 12, 1976, decision of Division 3. However this certificate cannot be reissued to vendor because the underlying intrastate authority upon which it was based has been cancelled. The Court's decision in this case emphasizes that registered authority cannot exist without concurrent underlying intrastate single-state authority. Section 206(a)(7)(A) of the Interstate Commerce Act, 49 U.S.C. Section 10932(b)(3), formerly contained in 49 U.S.C. Section 306(a)(7)(A).

We also note the Trustee's request that the Commission defer action until it files a petition for certiorari and the Supreme Court disposes of it. However, we are not at liberty to postpone any further our compliance with the mandate of the Fifth Circuit. The petitions of the Trustee filed September 27, 1978 and November 20, 1978, are denied.

The motion to strike, buttressed on the alleged lack of standing of the Trustee to prosecute the existing applications under section 207(a), is rendered moot in the light of our disposition of his pleadings.

It is ordered:

1. The petition of A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy), filed September 27, 1978, for reconsideration of the decisions of the entire Commission and of the Commission, Division 3 each entered August 21, 1978, is denied.

2. The petition of A-OK Motor Lines, Inc. (Samuel Kaufman, Trustee in Bankruptcy), filed November 20, 1978, seeking implementation of the November 6, 1978, decision of the United States Court of Appeals is denied.

3. The joint motion of Bee Line Express, Inc., Bowman Transportation, Inc., Floyd & Beasley Transfer Company, Inc., Georgia-Florida-Alabama Transportation Company, Hiller Truck Lines, Inc., and North Alabama Express, Inc., filed November 24, 1978, to strike the petition in (2) abive, is dismissed as moot.

4. The decision of the Commission, Division 3, entered August 12, 1976, is vacated and set aside.

5. This decision and the decisions of the entire Commission and Division 3 each entered August 21, 1978, shall become effective 30 days from the service date of this decision.

By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp, and Christian. Vice Chairman Brown absent and not participating.

H. G. Homme, Jr.,
Secretary

(Seal)

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY),
Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,
Respondents.

RESPONDENTS' REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

MAURICE F. BISHOP
BISHOP, SWEENEY & COLVIN
601-09 Frank Nelson Building
Birmingham, Alabama 35203
Counsel for Respondents

Dated: March 30th, 1979

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY),
Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,
Respondents.

RESPONDENTS' REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF[1]

This case involves a continuing effort by the petitioner to defeat or evade the specific statutory standards of 49 U.S.C.A. § 307 requiring proof of "the present or future public convenience and necessity" by applying the relaxed Elliott Doctrine (*C & D Motor Delivery Co.—Purchase—Elliott,* 38 M.C.C. 547, 553 (1942), see App. A, pp. 10-11) which holds that a Section 307 application may be supported by the intrastate carrier's past record. As noted by the Fifth Circuit (A-11):

> "Thus, the burden on the applying transferee is made significantly less difficult and his chances of success in obtaining interstate authority are enhanced."

1. This Reply is filed on behalf of the following respondents, each of whom was a protestant throughout the Commission proceedings and petitioners in the United States Court of Appeals for the Fifth Circuit: Bowman Transportation, Inc., Georgia-Florida-Alabama Transportation Company, Floyd & Beasley Transfer Company, Inc., Hiller Truck Lines, Inc., North Alabama Express, Inc., and Bee-Line Express, Inc.

The Trustee petitioner held only an interstate certificate based upon registration of its Alabama intrastate certificate under 49 U.S.C. § 306(a)(7)(A).

In this proceeding, the Trustee proposed to split and divide the registered certificate among four multi-state carriers. Each sought to receive authority between Birmingham and their selected parts in Alabama. The Trustee entered into four separate but similar contracts, each being conditioned upon approval of the Interstate Commerce Commission (ICC) and the Alabama Public Service Commission (APSC). The proposed split and transfer of the Alabama intrastate certificate was denied by the Alabama Commission. The denial was affirmed by the Alabama Supreme Court (*Alabama Public Service Commission, et al.* v. *Cooper Transfer Co., Inc., et al.*, 295 Ala. 209, 326 So.2d 283). After the interstate hearings were concluded, the parties materially amended their contracts to eliminate the required approval of the APSC and subsequently surrendered the intrastate certificate for cancellation. The Fifth Circuit held that the statute (49 U.S.C.A. § 306(a)(7)(A)) means what it says, i.e., a certificate of registration "may not be transferred apart from the transfer of the corresponding intrastate certificate".

The subject Petition for Certiorari was filed only by the proposed vendor of the registered certificate. Neither the ICC nor any of the proposed vendees have joined or endorsed the position here argued by the petitioner.

Following remand, the ICC noted that (App. D, p. 14):

> "The Court's (5th Circuit) judgment does give the Commission some flexibility as to the timing and manner of disposition of the 'directly-related' Section 207 applications. Thus the Commission could entertain a request to treat the Section 207 applications as new (independent) Section 207 applications, republish them as such, and set the matter for further hearing. But no Section 207 applicant has made such a request. Moreover the record is quite stale and we believe that the matter can best be handled in new Section 207 proceedings."

The petitioner has filed a supplemental brief discussing this decision of the Commission, arguing that the ICC entered a "final order approving the issuance of interstate authority to A-OK's successors several months prior to the cancellation by the State Commission of A-OK's intrastate authority" (Suppl. Br., p. 3). What the petitioner neglected to note was that:

—The Order of the ICC was vacated by the Fifth Circuit, and

—The Commission correctly noted in its Order served March 5, 1939 that (App. B, p. 8):

> "Accordingly, Division 3 had no authority under the Commission's own organizational structure at that time to consider the Section 207 applications since they were not 'directly related' to a valid proposal under Section 5(2)—the only circumstance under which Division 3 could consider Section 207 applications."

The respondents have previously noted, and the Commission has affirmed in its Order served March 5, 1979, that the applicants have readily available:

(1) "A request to treat the Section 207 applications as new (independent) Section 207 applications, republish them as such and set the matter for further hearing". But, as noted, the applicants have made no such request to the Commission.

(2) They could file applications for emergency temporary authority (ETA) and for temporary authority (TA) under 49 U.S.C.A. Section 310a. If there is an immediate and urgent need for service, the Commission can grant authority under this section "without hearings or other proceedings".

(3) They can file Section 207 applications. The Commission stated that "the record is quite stale and we believe that the matter can best be handled in new Section 207 proceedings."

Contrary to the petitioner's argument, the ICC has not held that the Trustee lost any of his alleged assets. Applying the specific language of 49 U.S.C. Section 306 (a) (7) (A), the Fifth Circuit held that a certificate of registration "cannot be transferred apart from the transfer of the corresponding intrastate certificate" upon which the registration was based.

We are at a loss to comprehend how the decision in *County of Marin* v. *United States*, 356 U.S. 412, 2 L.Ed.2d 879, 78 S.Ct. 880, can possibly afford any support to petitioner's position (See Reply Br., p. 14).

Finally, the decision of the Fifth Circuit did not, as petitioner suggests, affect the right of any division of the Commission to "hear and determine" all matters referred to them. It simply correctly held that:

> "Division 3 lacks authority to decide Section 207 applications where they are not 'directly related' to a Section 5 transfer application." (A-16)

And the Commission, to like effect, stated in its Order served March 5, 1979 (App. D, p. 8):

> "Accordingly, Division 3 had no authority under the Commission's own organizational structure at that time to consider the Section 207 applications since they were not 'directly related' to a valid proposal under Section 5(2)—the only circumstance under which Division 3 could consider Section 207 applications."

Thus, the Fifth Circuit and the Commission held that a division of the Commission cannot determine matters which have not been delegated to the division by the Commission. In short, a division cannot usurp the powers of the full Commission or decide matters not delegated to it.

Respectfully submitted,

MAURICE F. BISHOP
BISHOP, SWEENEY & COLVIN
601-09 Frank Nelson Building
Birmingham, Alabama 35203
Tel. 205 251-2881
Counsel for Respondents

Dated: March 30th, 1979

No. 78-1229

In the Supreme Court of the United States

OCTOBER TERM, 1978

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY), PETITIONER

v.

NORTH ALABAMA EXPRESS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

BARRY GROSSMAN
CATHERINE G. O'SULLIVAN
Attorneys
Department of Justice
Washington, D.C. 20530

MARK L. EVANS
General Counsel

CHRISTINE N. KOHL
Deputy Associate General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN, TRUSTEE IN BANKRUPTCY), PETITIONER

v.

NORTH ALABAMA EXPRESS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

1. Petitioner, a motor carrier that operated solely within Alabama, held a "certificate of registration" under former Section 206(a)(7)(A) of the Interstate Commerce Act, 49 U.S.C. 306(a)(7)(A), authorizing it to transport goods in interstate commerce incident to its intrastate authority.[1] It applied to the Interstate Commerce Commission for permission under Section 5(2) of the Act, 49 U.S.C. 5(2), to transfer portions of the authority evidenced by its certificate of registration to four multistate motor carriers. Carriers that operate in more

[1]This Act was recently revised, codified, and enacted without substantive change as Subtitle IV of Title 49 of the United States Code. Pub. L. No. 95-473, 92 Stat. 1337. In order to be consistent with the petition and the decisions of the court below and the Commission, all references here will be to the Interstate Commerce Act prior to the new codification.

than one state cannot hold certificates of registration. 49 U.S.C. 306(a)(7)(A). Thus, these four carriers also filed applications under Section 207 of the Act, 49 U.S.C. 307, seeking certificates of public convenience and necessity authorizing them to provide the services previously provided under petitioner's certificate of registration.

Petitioner attempted to obtain approval from the Alabama Public Service Commission to transfer the underlying intrastate authority as well. Because Section 206(a)(7)(A) provides that a certificate of registration may not be transferred apart from the transfer of the corresponding intrastate certificate, the Interstate Commerce Commission refused to authorize the transfer of petitioner's interstate rights until the Alabama authorities determined that it could properly transfer its intrastate authority as well (Pet. App. A84-A85, A88). The Alabama Commission denied approval for the transfer of the intrastate rights, and the Alabama Supreme Court upheld that decision. *Alabama Public Service Commission* v. *Cooper Transfer Co., Inc.*, 295 Ala. 209, 326 So. 2d 283 (1975).

Petitioner then offered to ask the state authorities to cancel its underlying intrastate authority in order to avoid the prohibition in Section 206(a)(7)(A) against the transfer of a certificate of registration apart from the transfer of the corresponding intrastate rights. The Commission's Division 3 concluded that this proposed procedure was permissible under the statute. Because it had previously determined that the transaction was otherwise in the public interest and that the public convenience and necessity would be served by the transfer of the service to the four interstate carriers, Division 3 approved petitioner's application to transfer its interstate authority, subject to the Alabama Commission's cancelling petitioner's intrastate authority or petitioner's agreement not to use that authority to support future interstate operations. (Pet. App. A98-A106).

The court of appeals remanded the case to the Commission with instructions to vacate and set aside its order (Pet. App. A1-A20). The court found that by denying petitioner's request to transfer its intrastate rights, the Alabama authorities had made it impossible for the applicants to avoid the prohibition in Section 206(a)(7)(A) against the transfer of a certificate of registration apart from the transfer of the corresponding intrastate rights (Pet. App. A15). The court added that petitioner could not avoid that prohibition by cancelling its intrastate rights because, in the court's view, interstate authority under a certificate of registration cannot survive after the underlying intrastate authority is lost (Pet. App. A14; see also *id.* at A16). For that reason, the court held that petitioner's Section 5(2) application to transfer part of its operating authority could not be granted. Observing that under the Commission's Organization Minutes, Division 3 could consider only those applications for certificates of public convenience and necessity that are "directly related" to a Section 5(2) transfer application, the court held that Division 3 of the Commission exceeded its authority when it approved the purchasing carriers' "unrelated" applications (Pet. App. A16).

2. The ruling of the court of appeals with respect to the jurisdiction of Division 3 is consistent with the Commission's internal rules applicable at the time of the agency's decision.[2] Section 17(4) of the Act, 49 U.S.C. 17(4), provides, however, that any division may "act as to any work, business, or functions assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission * * *." Moreover, as this Court has noted, " '[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the

[2]30 Fed. Reg. 11189, 11191 (1965).

orderly transaction of business before it when in a given case the ends of justice require it' " *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 539 (1970). Thus, the Commission's decision is not invalid because one division rather than another decided the case. In overturning the Commission's decision for this reason, the court of appeals was therefore in error.

Nonetheless, we do not urge that the petition be granted. The Commission is now reorganized into two divisions of general jurisdiction.[3] Either of the divisions now in existence would have authority to grant certificates of public convenience and necessity in a case such as this. Accordingly, this issue lacks any prospective significance and does not warrant review by this Court.

Moreover, none of the other questions raised by petitioner merits review. The court of appeals concluded that the cancellation of petitioner's intrastate authority terminated its incidental interstate authority and thus barred its transfer. It also held that the state agency's refusal to approve a transfer of the intrastate authority precluded compliance with Section 206(a)(7)(A) (Pet. App. A15).

These conclusions are not of significant importance to the administration of the Act. The circumstances of this case—an application for permission to transfer a certificate of registration, combined with a denial by state authorities of permission to transfer the corresponding intrastate authority—are unusual. Moreover, the court of appeals' decision does not deprive the Commission of the authority to grant certificates of public convenience and necessity, which are independent of the state's decision, when such cases occur.[4]

---

[3]42 Fed. Reg. 65181 (1977).

[4]The court of appeals' decision does not conflict with *County of Marin* v. *United States*, 356 U.S. 412 (1958), as petitioner asserts (Pet. 12-14). In that case the Court recognized that the Commission's jurisdiction over all aspects of Section 5(2) transactions is "exclusive and plenary," but it was not considering the specific limitations imposed by Section 206(a)(7)(A), which was enacted four years later.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

BARRY GROSSMAN
CATHERINE G. O'SULLIVAN
Attorneys

MARK L. EVANS
General Counsel

CHRISTINE N. KOHL
Deputy Associate General Counsel
Interstate Commerce Commission

MARCH 1979

DOJ-1979-03